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Ontario
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Decisions

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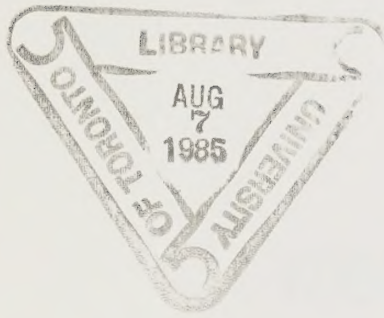
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**A Monthly Series of Decisions from the
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Selected decisions of particular reference value are also reported in *Canadian Labour Relations Boards Reports*, Butterworth & Co., Toronto.

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Duty to Bargain in Good Faith — Interference in Trade Unions — Unfair Labour Practice — No de facto decision to contract out made at time of negotiations — Decision to seek cost saving methods nebulous and not requiring unsolicited disclosure — *Westinghouse* and *Consolidated Bathurst* cases distinguished — Contract out solely motivated by business considerations not unlawful

BEFORE: G. Gail Brent, Vice-Chairman and Board Members H. Kobryn and J. A. Ronson.

APPEARANCES: *Norman L. Jesin, Ken Smith and Richard Drouin for the complainant; W. J. McNaughton, K. Bradbury and R. Lauzon.*

DECISION OF THE BOARD; June 19, 1984

1. The complainant has alleged that the respondent has violated sections 3, 15, 64, 66 and 72 of the Act. In the course of its submissions to the Board the complainant did not argue that there was an unlawful lockout of employees, therefore, we will not consider section 72 of the Act in the course of our reasons.

2. The respondent made several submissions to us by way of preliminary remarks asking us to dismiss the complaint. By agreement of the parties, and in order to ensure the case could be dealt with fully by the Board, there was no ruling given on any of the preliminary matters raised and the Board heard the merits of the case while reserving on the preliminary matters. Since both the preliminary matters and the merits rely to some extent on the same set of facts, we will set out all of the facts as we find them before determining any of the issues raised by the parties.

3. The parties have a long-standing collective bargaining relationship. The respondent is in the business of producing cellulose film. The prime product is sold to its customers in rolls. The product is originally produced in basic rolls and is then trimmed, coated and re-rolled according to customer specifications. After this process is completed the respondent is left with residual film some of which is the by-product of trimming and some of which is excess film left on the original roll. Some of that residual film is used to produce cellulose sheets which are then sold.

4. It was clear from the evidence that the respondent's sheeting operation only exists to convert what would otherwise be waste into something that can be sold to try to recoup the costs of producing the by-product. The uncontradicted evidence is that the sheeting operation has never been profitable for the respondent but has been carried on because the end result produces less of a loss than simply discarding the material as waste. Over the years the respondent has aimed at minimizing the amount of film which must be sent to sheeting and the complainant has been aware of the respondent's desire to reduce the amount of material which goes to its sheeting operation. The subject has been discussed in meetings which the parties have held during the life of the collective agreement. It was not disputed that the complainant was aware that if the respondent were successful in reducing the film for sheeting to its desired minimum levels, some jobs would be lost in the sheeting area. There were eleven employees in the area at the time of the complaint.

5. The current collective agreement between the parties (Exhibit #1) covers the period July 1, 1983 to June 30, 1984. Negotiations were successfully concluded in July, 1983 and the collective agreement was executed on November 3, 1983. To start those negotiations on April 28, 1983 the respondent sent the complainant a list of proposals for collective bargaining (Exhibit #2) and on April 29, 1983 the complainant sent its proposals to the respondent (Exhibit #3). The existing collective agreement contained some provisions regarding contracting out, and technological change (articles 1.07(b), 13, and 14). Neither proposal set out any substantive changes to the language of those closures.

6. In March, 1983, during the open period which preceded those negotiations, the respondent had contracted out the work of its trucking operation between Cornwall and Montreal. One job was affected. The parties met then and the complainant was advised of the respondent's plan to contract out the trucking. The change occurred at the same time as a general manpower rationalization which led to a total of eight to twelve layoffs including the loss of the trucking job. As pointed out above, in the ensuing negotiations there was no proposal regarding changes in the contracting out language.

7. Dealing with the sheeting operation in particular, the respondent was first approached in March, 1982 by a retired employee who indicated he had heard that it was considering eliminating its sheeting operation and was interested in doing the work. No serious discussions took place regarding that inquiry (see Exhibit #11). In March, 1983 the respondent placed one advertisement in a trade publication to try to ascertain whether anyone might be interested in doing sheeting on its behalf (Exhibit #12). It received one response to that advertisement but did not follow it up because it was not interested in doing business with the party who responded. The advertisement listed a box number for responses because the respondent wanted to maintain confidentiality so as not to affect its market.

8. Sometime between March and May, 1983 the respondent approached a sheltered workshop (ARC Industries) to determine if it was interested in doing sheeting. A tour of the sheeting operation was conducted and it was concluded that ARC Industries could not perform the sheeting operation safely. In May, 1983 a firm known as ECCO Packaging approached the respondent concerning its sheeting operations and the respondent conducted a tour of its sheeting operation then. During both of these tours the sheeting operation was being performed by bargaining unit employees. As of May 18, 1983 or shortly thereafter, the ECCO proposal regarding subcontracting the sheeting operation was rejected as not being an economic solution to the problem (Exhibit #14).

9. Based on the evidence before us it is apparent that the respondent's objectives after that were to effect savings by reducing the amount of film going to sheeting by one half. (See Exhibits #15, 16, 17 and 18.) It attempted to do this by tracing and controlling the sources of the material which ended up in sheeting.

10. In October, 1983 the respondent received another unsolicited approach from a former employee who was interested in taking over its sheeting operation. Nothing was done to pursue that proposal (Exhibit #19).

11. The complainant was not informed of any of these subcontracting overtures or of any of the respondent's thinking about contracting out sheeting. The respondent's evidence was that it saw no need to inform the complainant because it was just exploring the concept and not making any plans.

12. In January, 1984 the respondent received a proposal from Frontenac Packaging Ltd. One of the principals of Frontenac is related to the respondent's comptroller and Frontenac learned of the respondent's concerns with its sheeting through a conversation between these two individuals. The Frontenac proposal (Exhibit #20) dated January 23, 1984 cited the respondent's cost to produce sheeting at around 60 per pound and undertook to produce sheeting for around 44 per pound. It was accepted sometime after January 23rd.

13. On March 26, 1984 the respondent notified the complainant that it was going to contract out its sheeting operation on or about April 30, 1984, that approximately ten employees would be laid off as a result and that two new positions would be created. It also invited the complainant to discuss these matters (Exhibit #4). On April 5, 1984 notice of layoff was posted (Exhibit #5); this was later rescinded and on May 24, 1984 a new notice was posted (Exhibit #10) effective June 22, 1984.

14. On April 24, 1984 the respondent submitted its proposals for collective bargaining negotiations to the complainant (Exhibit #6). On April 27, 1984 the complainant submitted its proposals to the respondent (Exhibit #7). The complainant's proposals include a contracting out provision. The parties are currently bargaining to renew the collective agreement which expires June 30, 1984.

15. On April 30, 1984 the complainant filed a grievance (Exhibit #8) alleging a violation of article 14. This grievance is proceeding through the various steps of the grievance procedure.

16. Based on the evidence before us we consider that the most probable conclusion to be drawn is that after mid-May, 1983, when the ECCO Packaging proposal was rejected, contracting out ceased to be regarded as a likely avenue to be actively pursued by the respondent. We accept the evidence of the respondent that while the collective agreement was being negotiated in 1983 there was no decision, firm or otherwise, to contract out and that there was a decision made to realize savings by reducing the amount of material which had to be used in sheeting. As a consequence, we can see no basis for the application of the reasoning in *Westinghouse Canada Limited* [1980] OLRB Rep. April 577 or *Consolidated Bathurst Packaging Ltd.* [1983] OLRB Rep. Sept. 1411 to give rise to any obligation to make an unsolicited disclosure about contracting out.

17. We can see no basis in the evidence for drawing any inference that the respondent had made a *de facto* decision to contract out while negotiating for the 1983/84 collective agreement. There is ample evidence to the effect that the respondent viewed the sheeting operation as a necessary evil which it required to reduce the cost of its production waste. It seems to have been an open secret that it would get out of its sheeting operation if it could be presented an attractive viable alternative. That seems to have been the extent of the respondent's planning. It did nothing to invite proposals after May, 1983 and all of its actions after that date were aimed at improving its production of film so that the sheeting operation would get less material. This is exactly the sort of planning situation that both the decisions in *Westinghouse, supra*, and *Consolidated Bathurst, supra* regarded as being beyond the scope of any duty to volunteer information.

18. In view of this factual determination we consider that it is not necessary to determine whether the complaint is untimely. Timely or otherwise, there is just no factual framework on which one can fit any duty of voluntary disclosure during bargaining here. Any decision which had been made was so nebulous that disclosure could not possibly have put the complain-

ant in any better position during bargaining than it was already in by knowing the general arbitral jurisprudence on contracting out and the existing provisions of its collective agreement. We can therefore find no basis for finding a violation of section 15 of the Act.

19. The arbitral jurisprudence regarding contracting out is generally accepted and is clear. In interpreting collective agreements, contracting out is allowed for valid business reasons unless it is specifically limited or prohibited. As recorded in *Sunnycrest Nursing Home Limited*, [1982] OLRB Rep. Feb. 261 at paragraph 25, employers are free to contract out under the Act provided that they are "motivated by genuine business considerations, rather than a desire to defeat or impede his employees in the exercise of their statutory rights".

20. In this case the respondent's evidence was that its labour cost in producing the sheets was in excess of 50% of its cost of the operation. There is no dispute that it was anxious to cut off the supply of film to its sheeting operation and to maximize the use of the film it produced in the major production area. It never regarded the sheet operation as anything but a way to cut down the financial loss associated with waste film. There was more modern, less labour intensive equipment which could be used in sheet production but the respondent's evidence was that it did not wish to invest capital in acquiring such machines for its operation. There is no suggestion in the evidence that the decision to contract out the work was made for any reason other than valid business reasons. The more probable conclusion is that the only reason for the contracting out was connected with a desire to take advantage of a situation which could either make the sheeting operation profitable or at least minimize loss from it as much as possible. Given the complexities of determining the cost to the respondent of an operation based solely on the utilization of a waste by-product, and the fact that the operation had never been profitable, it is difficult to conclude that a factor in the respondent's decision was a desire to avoid its negotiated wage rates and other obligations in the collective agreement. When all of the facts are examined, the more probable conclusion is that the sole reason for the decision was a genuine business consideration associated with minimizing the loss from having waste material. Therefore, given that the Act does not prohibit contracting out, per se, and given all of the evidence, we must conclude that there has been no anti-union animus and no violations of sections 3, 64 and 66.

21. The parties are now in the midst of negotiating a new collective agreement. They are in a position to deal with the impact of the particular decision to contract out the sheeting operation as well as with the issue of contracting out generally. They should be left to do that. There have been no allegations of bad faith in connection with this round of bargaining and we should not interfere with their collective bargaining for a new agreement without good reason.

22. For all the reasons set out above, this complaint is dismissed.

0299-84-R Labourers' International Union of North America, Local 506,
Applicant, v. **Carswell & Norton Limited**, Respondent

Employer — Construction Industry — Professional engineering firm acting as agent of owner — client — Hiring two labourers and co-ordinating work on project — Constituting employer in construction industry for purpose of certification

BEFORE: R. A. Furness, Vice-Chairman, and Board Members H. Kobryn and I. Stamp.

APPEARANCES: *Linda Rothstein, Tony Neil and Mike Mihajovic for the applicant; David P. Carswell for the respondent.*

DECISION OF THE BOARD; June 13, 1984

1. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on September 6, 1978, the designated employee bargaining agency is The Labourers' International Union of North America and The Labourers' International Union of North America Ontario Provincial District Council.

2. The respondent requested a hearing of this application for certification and stated in paragraph 13:

Carswell & Norton Limited is a corporation licensed to practise professional engineering in the Province of Ontario. We are not a contracting firm. As an agent of the Owner, we do not consider ourselves as an employer in the definition of the Labour Relations Act.

3. On the date of the filing of this application the respondent employed two construction labourers. The respondent acts as an agent on behalf of an owner-client. Ninety-eight per cent of the work on the project in the City of Toronto is contracted out to other employers. The respondent administers and co-ordinates the work on the project and has hired the two labourers to maintain safety on the project — such as building fences and guards. In addition, the two construction labourers have done backfill work and finished concrete. This is the first time that the respondent has engaged in such activities. The present project commenced some thirteen months ago. The primary purpose of the respondent is to engage in professional engineering and not general contracting.

4. The two construction labourers receive paycheques from the respondent and deductions are made on behalf of Revenue Canada. Supplementary benefits under the provincial collective agreement have been remitted by the respondent in its own name. The two construction labourers' day-to-day activities are directed and supervised by the respondent. Layoffs and hiring back have been made at the instance of the respondent. The two construction labourers have been performing the work of construction labourers in the construction industry as defined in section 1(1)(f) of the *Labour Relations Act* and perceive the respondent to be their employer. The respondent agrees that it is the employer and hired the two construction labourers for their skills.

5. The evidence establishes that the respondent has been engaged for more than a year in performing work within the construction industry — albeit on a small scale — on a project in the City of Toronto. The Board has on many occasions considered employers such as the respondent in relation to the definition of employer in section 117(c) which states:

“employer” means a person who operates a business in the construction industry, and for purposes of an application for accreditation means an employer for whose employees a trade union or council of trade unions affected by the application has bargaining rights in a particular geographic area and sector or areas or sectors or parts thereof.

6. In *The Municipality of Metropolitan Toronto*, [1980] OLRB Rep. Jan. 62 at pages 70-71, the Board stated:

33. The Board has previously considered the meaning to be given to section 106(c) [now section 117(c)] of the Act. In the *Tops Marina Motor Hotel* case, 64 CLLC ¶16,004, a registered partnership consisting of an investor, a salesman, a lawyer and a builder was formed for the purpose of building and operating a motor hotel. This was the first venture of the partnership. The Board found that the work which was being performed fell within the definition of construction industry in section 1(1)(da) [now section 1(1)(f)] of the Act and that the partnership was the employer of the carpenters who were affected by the application. The Board rejected a contention that in order to operate a business in the construction industry the construction work must be for persons other than those engaged in the work and stated that it was not disposed to place such a general restriction on the word “business”. The Board also considered whether the primary or predominant purpose of the operation ought to be the test under section 90(a) [now expressed in section 117(c)] of the Act and stated at page 645:

“This brings the Board to counsel’s second argument that the primary or predominant purpose of the operation ought to be the test. The legislation does not use this language, and if that had been the intention of the Legislature, it would have been a simple matter to have said ‘employer means a person who operates a business primarily in the construction industry’ or some similar wording. Furthermore, it seems to the Board that an employer whose primary business is that of manufacturing but who in addition to selling his products to others, operates a construction division for the purpose of erecting his product at a construction work site, would be excluded automatically from the definition if the test suggested by counsel were to be adopted. Again, the Board is not disposed at the present time to place such a general restriction on the word ‘business’ as it appears in the section.

There remains for consideration, however, the question as to whether the respondent is operating a business in the construction industry. As has already been noted, the respondent’s sole activity at the present time is that of constructing a building. In that sense therefore, its present and sole ‘profession’, ‘trade’, ‘employment’, ‘engagement’, or ‘occupation’ (to take some of the meanings of the word ‘business’) is construction

work. However, assuming the present intentions of the partnership are carried through to fulfilment, the partnership will then be engaged in the operation of a motor hotel and in the construction of a second motor hotel. If this turns out to be the case, then in the Board's view the respondent's 'profession', 'trade', 'employment', 'engagement', or 'occupation' is that of building and operating motor hotels. While it may be that in the long run the respondent will be occupied more with operation than with building, the construction activity is an important and concrete part of its objects. Thus it appears to the Board that whether attention is focused only on the respondent's present activity or on its present activities and future plans, the respondent is operating a business, perhaps not its main business, but nevertheless a business in the construction industry within the meaning of *The Labour Relations Act*."

34. In the instant application the respondent, far from being engaged intermittently in undertaking the work which is being performed by the temporary carpenters, is regularly and continuously engaged in such work. Moreover, while the dollar volume of such work is small in comparison to the construction work which is performed on a tender basis, the dollar volume of such work performed by the carpenters exceeds the dollar volume of many employers who work solely in the construction industry. In addition, the respondent employs more trades than many employers in the construction industry. As the Board stated in the *Tops Marina Motor Hotel* case, *supra*, it is not necessary that the business of an employer in the construction industry is the predominant or primary business. The soundness of that position has become clear over the years when the Board considers the number of large construction projects which have been accomplished by owner-builders and developers. In addition, as the Board stated in the *Kapuskasing Board of Education* case, 72 CLLC ¶16,057, there is no requirement that in order to operate a business an operator of such business must necessarily carry on such venture with a view to making a profit. See also *Canada Labour Relations Board et al. v. City of Yellowknife*, (1977) 76 D.L.R. (3d) 85. Similarly, in *The Board of Trustees of the Roman Catholic Separate Schools for the City of Windsor* case, [1966] OLRB Rep. March 920, this Board, in a proceeding under section 47a [now section 63(1)] of the Act, stated at page 922:

"In the instant case, the term 'business' should be given that interpretation most consistent with the other provisions of *The Labour Relations Act* and which will best effect the purposes of that section of the Act in which the term appears. It should be borne in mind that the Act does not distinguish between public and private business, and contemplates the existence of bargaining rights held by trade unions with respect to 'employers' generally and not simply those engaged in commercial enterprises. Nothing in the Act would suggest that any limitation on the continuance of these bargaining rights should be imposed by virtue of the non-commercial nature of any employer's 'business'. The term 'business' as it appears in *The Labour Relations Act*, therefore, ought not to be qualified by the addition of the

adjective 'commercial', but should rather be read as referring generally to the *undertaking* of any employer whose operations are subject to this Act."

7. In the instant application, it may well be that the respondent's predominant business is not in the construction industry itself. However, the respondent has entered the construction industry as one of its businesses even though this project is its first venture. The respondent may undertake similar or other projects in the future. The Board finds no reason to distinguish the result in *Tops Marina Motor Hotel, supra*, from the result which is clearly appropriate in the instant case.

• • •

[Balance of decision, finding appropriate bargaining unit, degree of membership support and issuing certificates, omitted]

1296-82-U; 0195-83-U Luciano D'Alessandro and Donato Marinaro, Complainants, v. Labourers' International Union of North America, Local 1089, and Rocco D'Andrea, Respondents

Duty of Fair Referral — Evidence — Practice and Procedure — Unfair Labour Practice — Witness — Prior Board decision finding manner of administering hiring hall contravened referral duty — Board not relying on findings of fact in subsequent complaint filed by different complainants — Whether party entitled to cross-examine own witness on basis of hostile witness or s.23 of *Evidence Act* — Inconsistency in statements during testimony in chief and cross-examination not grounds for cross-examination of own witness

BEFORE: Robert D. Howe, Acting Chairman, and Board Members F. W. Murray and W. F. Rutherford.

APPEARANCES: *Ed J. Brogden and Dianne L. Haskett for the complainants; A. M. Minsky, R. D'Andrea and D. D'Andrea for the respondents.*

DECISION OF THE BOARD; June 6, 1984

1. These are complaints under section 89 of the *Labour Relations Act* in respect of certain hiring hall referrals. The complaints were consolidated by the Board on August 18, 1983 (along with certain other section 89 complaints which are no longer before the Board). The complaints allege various violations of section 69 of the Act, which provides:

Where, pursuant to a collective agreement, a trade union is engaged in the selection, referral, assignment, designation or scheduling of persons to

employment, it shall not act in a manner that is arbitrary, discriminatory or in bad faith.

Mr. Marinaro's complaint also alleges a violation of section 70 of the Act in relation to the impugned referrals. (In addition to section 69, Mr. D'Alessandro also initially alleged that he had been dealt with by the respondents contrary to section 68 of the Act. However, that allegation was withdrawn on February 2, 1984 by Mary Portiss, who was at that time acting as his counsel.)

2. In a decision dated July 11, 1983 in File No. 1278-82-U (reported in [1983] OLRB Rep. July 1160), another panel of the Board found that the respondent trade union (also referred to in this decision as "Local 1089") had engaged in arbitrary and discriminatory referrals to employment and designations to employment in the administration of its hiring hall contrary to section 69 of the Act, and made an extensive order to remedy the situation. That complaint was brought by Joe Portiss, who is serving as an advisor to complainants' counsel in the instant case. On January 31, 1984, the present panel of the Board heard submissions of the parties concerning the extent to which we could rely in the instant proceedings on the findings made in the *Portiss* case. On February 1, 1984, the Board made the following oral ruling (which counsel for the respondents requested the Board to provide in the form of a written decision):

Having carefully considered the submissions of the parties, we are not prepared to adopt, without proper proof before this panel, the findings of fact contained in the decisions of the Board, differently constituted, in the *Joe Portiss* case (File No. 1278-82-U). With respect to the extent to which the Board can rely upon findings made in an earlier decision, see generally *Radio Shack*, [1979] OLRB Rep. March 248; *Re Tandy Electronics Ltd.*, [1979], 26 O.R. (2d) 68 (Div. Ct.); *Napev Construction Limited*, [1980] OLRB Rep. June 862; and *Oakwood Park Lodge*, [1980] OLRB Rep. Oct. 1501.

The present complainants were not parties to the *Portiss* complaint, nor were they privies to any of those parties. Thus, if Mr. Portiss's complaint had been dismissed, they would not have been precluded from filing the present complaints by the concept of *res judicata*, issue estoppel, or any analogous legal principle. Moreover, the issue before the Board in the *Portiss* case was whether the respondent trade union contravened section 69 of the Act by acting arbitrarily, discriminatorily or in bad faith in the selection, referral, assignment or scheduling of Mr. Portiss to employment. The issue in the present case is whether the respondent trade union has acted arbitrarily, discriminatorily or in bad faith in the selection, referral, assignment, designation or scheduling of Donato Marinaro and Luciano D'Alessandro to employment. Although the Board awarded extensive relief to remedy the hiring hall abuses which it found in that case, we do not view that decision as being a decision *in rem* which is binding as against any and all future parties. The respondents elected to call no evidence in respect of the complaint by Joe Portiss. However, they are entitled by the rules of natural justice and by section 102(13) of the Act to present evidence and make submissions in respect of the present consolidated complaints if they wish to do so. As indicated in our earlier ruling in which we found the section 89(5) "reverse onus" to be inapplicable in the present case, the onus is on

the complainants to duly prove their complaints on the balance of probabilities. The fact that another member of their union succeeded in proving his complaint and obtained monetary and other relief from the Board does not assist the present complainants, although the existence of the broad remedial order made in that case is a matter of public record and can be taken into account in the present case in determining the appropriate remedy to be granted to the complainants if their case succeeds. Similarly, the method of calculation of damages set forth in that panel's decision dated September 30, 1983 (reported in [1983] OLRB Rep. Sept. 1554) may well be of assistance to the present panel if it becomes necessary to quantify damages, since we would be unlikely to deviate from that approach unless we were satisfied that the approach adopted in that case is inappropriate in the circumstances of the present case. Thus, the existence of the *Portiss* decisions is by no means irrelevant to the present proceedings. However, for the aforementioned reasons, we are not prepared to accede to the complainants' request that we adopt and apply the findings of fact contained in those decisions.

We are very concerned, however, about the potential length of the present proceedings, and the associated costs to the parties and to the Board. Accordingly, we strongly urge counsel to meet and attempt to agree upon as many pertinent facts as possible so as to narrow and define the factual issues in dispute between the parties. It appears to us that it is in the interest of all of the parties to minimize as far as possible the number of days of hearing time required to litigate this case, so as to minimize legal and other costs associated with it and avoid unnecessarily protracted and costly litigation.

3. On April 12, 1984, Mr. Brogden, who (along with Ms. Haskett) had by that time become counsel for both complainants, subpoenaed and called Anna Iacobelli to testify as a witness in these proceedings. At the beginning of her testimony, Ms. Iacobelli testified that she has worked for the respondent trade union since June of 1979, initially as a receptionist and later as a bookkeeper. Her duties as a receptionist included "taking dues, sending people out to work, filing, typing, answering the phone, and transferring men in and out". At all material times, the respondent Rocco D'Andrea, who is the business manager of Local 1089, has been her immediate supervisor, but she also takes instructions from Orfeo Iacobelli, whom she advised the Board (near the outset of her evidence) to be her father and (as President of Local 1089) a member of the Local's Executive Board. Mr. Iacobelli is also a full-time business representative of Local 1089.

4. Mr. Brogden's examination-in-chief of Ms. Iacobelli continued for approximately five and a half hours on April 12 and a further five and a half hours on May 1. She was then cross-examined by respondents' counsel for about an hour on May 1 and for approximately four hours on May 2. When Mr. Brogden was asked by the Board near the end of that hearing day if he wished to re-examine the witness, he advised the Board that it was his intention to have Ms. Iacobelli "declared an adverse and hostile witness", and to seek leave to cross-examine her, on the basis of (alleged) inconsistencies between her evidence-in-chief and her evidence in cross-examination. After hearing some initial submissions with respect to that matter and with respect to whether the hearing should be adjourned to afford complainants' counsel an

opportunity to prepare further submissions on the matter, the Board, after recessing to consider the situation, ruled as follows:

Having regard to all the circumstances, including the hour of the day, and in an effort to avoid any unnecessary loss of hearing time, we are prepared to afford counsel for the complainants an opportunity to submit written argument concerning this matter, such argument to be provided to the Board and to counsel for the respondents on or before Monday, May 14, 1984. Counsel for the respondents will then have an opportunity to respond by means of written submissions to the Board and to counsel for the complainants on or before Wednesday, May 23rd. Counsel for the complainants will then have an opportunity to submit written reply argument to the Board and to counsel for the respondents on or before Wednesday, May 30. It is our hope that this process will permit the Board to be in a position to rule on this matter by the commencement of the continuation of hearing scheduled for June 12, 1984 in this matter.

5. The written submissions filed with the Board on behalf of the complainants pursuant to that ruling were prepared by Ms. Haskett. In those submissions, counsel requests the Board to grant Mr. Brogden leave to “fully cross-examine” Ms. Iacobelli. In support of that position it is alleged that Ms. Iacobelli is a hostile witness. In the alternative, counsel relies upon section 23 of the *Evidence Act*, R.S.O. 1980, c. 145, as a statutory basis for fully cross-examining Ms. Iacobelli, or cross-examining her on certain statements made by her in examination-in-chief which are allegedly inconsistent with other statements made by her during cross-examination.

6. In his written response to those submissions, Mr. Minsky submits on behalf of the respondents that Ms. Iacobelli’s answers given in cross-examination are not inconsistent with her answers given in examination-in-chief and that, in any event, the preconditions for the application of section 23 of the *Evidence Act* have not been met. He further submits that there is no factual or legal basis for the complainants’ claim that Ms. Iacobelli is a hostile witness.

7. For the purposes of this decision we are prepared to assume, without deciding, that there are some inconsistencies between Ms. Iacobelli’s answers in examination-in-chief and her answers in cross-examination. Indeed, it would be rather remarkable if there were not at least some minor inconsistencies in the evidence of a witness testifying for a total of approximately sixteen hours, over the course of three days, concerning numerous events which occurred over a span of several years. However, in fairness to the witness, we feel compelled to observe that at least some of the alleged inconsistencies appear to have arisen from the fact that she was responding to substantially different questions. For example, testimony that the witness is not required to read collective agreements as part of her job is not inconsistent with testimony that she “sometimes” does look at collective agreements and has some awareness of their contents (on the basis of what others have told her about them) and their impact on the operation of a hiring hall. The same may be said of Ms. Iacobelli’s evidence concerning the requirement of attempting to telephone for two hours (at intervals of approximately ten minutes) persons whose names have reached the top of the out-of-work list, which evidence was later qualified in cross-examination concerning calls to members with specific qualifications listed next to their names on that list. It is also apparent from both the written submissions of Ms. Haskett and Mr. Minsky that neither of them have completely accurate notes of the evidence. For example, Mr. Minsky indicates (at page 7 of his submissions) that his “notes reveal that the entire question of calling a member for a period of two hours was raised in cross-examination for

the first time". However, in actual fact that matter arose in Ms. Iacobelli's testimony-in-chief in respect of the matter of why Mr. Marinaro was not called until 2:00 p.m. on May 6, 1983, rather than earlier that day. Similarly, Ms. Haskett suggests (at page 2 of Schedule "A" to her submissions on behalf of the complainants) that Ms. Iacobelli indicated in examination-in-chief that a member who was sick would be "in limbo", but stated in cross-examination that if a member was sick he was kept at the top of the list until he could return to work. In fact, what Ms. Iacobelli testified in both examination-in-chief and in cross-examination is that a member is "in limbo" until he provides a medical certificate indicating that he is fit to go to work, after which he must wait seven days before being referred to work on the basis of his name being, in effect, at the "top of the list".

8. A party seeking leave of the Board to embark upon a full cross-examination of a witness called by that party must satisfy the Board that the witness has proven "hostile" (or that some other proper basis exists for granting such leave). Having duly considered the written submissions of counsel and all of Ms. Iacobelli's testimony to date, we have concluded that there is no factual or legal basis for the complainants' contention that Ms. Iacobelli is a hostile witness. In *Reference re R. v. Coffin*, [1956] S.C.R. 191, at page 213, Kellock J. defined "hostile" as "not giving . . . evidence fairly and with a desire to tell the truth because of a hostile animus toward the [party who called the witness]." The issue of hostility is determined by the Board observing the witness as she gave her evidence, and considering her demeanour, general attitude, and the substance of her evidence (see, for example, *The Corporation of the Town of Meaford*, [1981] OLRB Rep. June 634, and the authorities referred to in that decision). We are not, of course, in a position to conclusively determine at this stage of the proceedings the matter of Ms. Iacobelli's credibility as a witness, or the weight to be given to her evidence. That can only be done after we have heard and considered all of her testimony, and all of the other evidence that has been and will be adduced during the course of this case. It is sufficient for the purposes of this decision to find that Ms. Iacobelli has not in any of her testimony to date demonstrated hostility towards the complainants. It is true that Ms. Iacobelli was quite annoyed by Mr. Brogden's suggestion that she was not a truthful witness. It is also true that she was admonished by the Board when she expressed that annoyance from the witness box during the course of Mr. Brogden's submissions to the Board on the afternoon of May 2nd. While we do not agree with Mr. Minsky that Ms. Iacobelli's reaction to Mr. Brogden's submissions is "an irrelevant and extraneous consideration" with respect to the issue of hostility, we are satisfied that her reaction, although not appropriate in the context of a Board hearing, is somewhat understandable under the circumstances and does not, in any event, establish her to be a hostile witness in the sense referred to above.

9. For the foregoing reasons, counsel for the complainants' request to cross-examine Ms. Iacobelli on the basis of her being a hostile witness is denied. We shall now proceed to consider whether section 23 of the *Evidence Act* provides a basis for permitting such cross-examination, as submitted on behalf of the complainants. That section provides as follows:

A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may contradict him by other evidence, or, if the witness in the opinion of the judge or other person presiding proves adverse, such party may, by leave of the judge or other person presiding, prove that the witness made at some other time a statement inconsistent with his present testimony, but before such last-mentioned proof is given the circumstances of the proposed statement sufficient to

designate the particular occasion shall be mentioned to the witness and he shall be asked whether or not he did make such statement.

As submitted by counsel for the respondents, it is apparent from the language of that section that it is inapplicable in the circumstances of the present case. That the words “at some other time” refer to a time other than a time at which the witness was testifying before the Board as a witness in the instant case is apparent from the fact that the section contemplates that the party seeking to rely on that provision will “prove” that the witness made such statement. Before “such . . . proof is given”, the section requires that “the circumstances of the proposed statement sufficient to designate the particular occasion shall be mentioned to the witness” By way of contrast, the inconsistent statements upon which complainants’ counsel relies were (allegedly) made by the witness during her examination-in-chief in the present proceedings. Thus, there is nothing for the Board to give counsel leave to prove. Further support for that position is provided by *Wawanesa Mutual Ins. Co. v. Hanes*, [1961] O.R. 495 (Ont. C.A.) in which MacKay J. A., in explaining the policy basis for section 23, wrote as follows (at page 534):

The only purpose of a trial, in so far as the facts of a case are concerned, is to ascertain the truth of the matters in issue and it seems to me that this purpose might well be defeated if a party were not permitted to show that a witness called by him in good faith, on reliance of the witness’s previous statement, has told a story *in the witness-box* inconsistent with his previous statement in respect of the same facts. In such case it is of the utmost importance, in the interests of justice, that such a witness should be compelled to explain his change of story.

(Emphasis added.)

See also page 529 at which the learned appellate justice wrote, in part, as follows:

. . . I think there is support in many of the decisions I have referred to for the proposition that it is in the interests of justice that where a witness has previously made a statement in regard to the matters at issue at a trial that is inconsistent with his testimony in the witness-box, that that fact should be made known to the trial tribunal in order that proper weight may be given to the evidence.

10. All that section 23 empowers a party to do (with leave of the Board) is to prove that the witness made a statement inconsistent with the witness’s “present testimony”. In this regard, reference may usefully be made to the following passage from MacKay J. A.’s aforementioned judgment (at page 528):

It is to be observed that the only right given by s. [23] is, if the witness proves adverse, with leave of the Judge, to prove that the witness made at other times a statement inconsistent with his present testimony. There is nothing in the section as to cross-examination and the section does not come into operation unless there is evidence to prove a prior inconsistent statement. There is, I think, no question that if a witness proves hostile and is so declared by the Judge, counsel may cross-examine the witness generally as to the matters in issue in the manner stated by Cross, including cross-examination as to any prior inconsistent statements, whereas on an application made under s. [23] of the *Evidence Act*, the only right that can be given is to prove

the prior inconsistent statement after having drawn to the attention of the witness, the statement and the circumstances of the making of it and asking him whether he had in fact made it. If he admits having made it that admission supplies the proof and the calling of the witnesses to prove the making of it would be unnecessary but unquestionably he could be questioned in regard to whether the prior statement was true and if he admitted its truth it would be evidence to be considered in the case. If he denies having made it and it is proved by other witnesses that he did, then it goes only to the credibility of the witness.

In the instant case, the statements which complainants' counsel relies upon are said to form part of the witness's "present testimony". Thus, it is nonsensical to speak of the Board giving complainants' counsel leave to prove that such statements were made. If they were in fact made, they already form part of the evidence before us. Moreover, this situation does not fall within the ambit of the policy considerations described by MacKay J. A. in the *Wawanesa* case. This is not a situation in which "a witness called by [complainants' counsel] in good faith, in reliance on the witness's previous statement, has told a story in the witness box inconsistent with [her] previous statement in respect of the same facts", and in which the Board may be misled by the witness's testimony in its quest for the true facts, by virtue of being unaware of the earlier inconsistent statement. As noted above, the inconsistent statements were allegedly made before the Board as part of the witness's evidence-in-chief and, therefore, can be duly considered by the Board in assessing the weight to be given to the witness's other evidence without any need for relying upon section 23. Thus, it is our conclusion that section 23 of the *Evidence Act* provides no support for the request by complainants' counsel for leave to cross-examine Ms. Iacobelli.

11. A four page "reply" to Mr. Minsky's submissions was filed with the Board by Mr. Brogden. That document includes submissions which go considerably beyond the proper scope of reply argument. For example, in that document Mr. Brogden suggests for the first time that he should be permitted to cross-examine Ms. Iacobelli on the ground that she "was treated by all counsel and . . . by the tribunal, as if she was an expert witness". If we were of the view that there was any merit in those of Mr. Brogden's "reply" submissions which exceed the proper ambit of reply argument, we would have to decide whether to disregard those submissions or to take them into account only after affording Mr. Minsky an opportunity to answer them. However, it is unnecessary to resolve that question in the present case since none of the submissions contained in that document persuade us that complainants' counsel should be afforded an opportunity to cross-examine Ms. Iacobelli at this stage in the proceedings. Ms. Iacobelli was neither declared to be an expert witness nor so treated by the Board or by counsel. As indicated above, she testified concerning the operation of Local 1089's hiring hall on the basis of her experience as a receptionist (and later a bookkeeper) in that respondent's office. She has a Grade 12 education, but has no special training in secretarial or other skills pertaining to the operation of a hiring hall, nor is there any evidence that she has any familiarity with the operation of hiring halls other than Local 1089's. To the extent that counsel seeks leave in his reply to cross-examine Ms. Iacobelli on the basis that, as a matter of policy, the Board should permit counsel to test her honesty and the accuracy of her evidence by "the only method available to our adversary system of practice", we note that there are well-established principles which govern the use of that method and that the Board, while not strictly bound by the rules of evidence and procedure adopted by the Courts, does not find it appropriate to permit the unprecedented and unwarranted departure from those procedures which complainants' counsel advocates in this case.

12. In summary, complainants' counsel has not satisfied us that he should be permitted to cross-examine Ms. Iacobelli at this stage of the proceedings on the basis of common law

principles concerning hostile witnesses, on the basis of section 23 of the *Evidence Act*, or on any other basis. Counsel has not cited, nor has the Board's independent research revealed, any authority which would support the proposition that inconsistencies between a witness's testimony during examination-in-chief and her testimony in cross-examination make it appropriate for a tribunal to permit counsel to cross-examine the witness during re-examination, in the absence of a finding of hostility on the part of the witness. Nor are we satisfied as a matter of policy or procedure that the Board should permit such cross-examination in the circumstances of this case.

13. For the foregoing reasons, counsel for the complainants' request for leave to cross-examine Ms. Iacobelli at this stage of the proceedings is hereby denied. This ruling does not, of course, preclude counsel from renewing his request to cross-examine Ms. Iacobelli if she proves to be a hostile witness during the course of her re-examination. It also does not preclude counsel from re-examining Ms. Iacobelli concerning the statements in question in order to clarify testimony given in-chief that has been obscured in cross-examination (see Sopinka and Lederman, *The Law of Evidence in Civil Cases* (Toronto: Butterworth & Co. (Canada) Ltd., 1974) at page 516).

1296-82-U; 0195-83-U Luciano D'Alessandro and Donato Marinaro, Complainants, v. Labourers' International Union of North America, Local 1089, and Rocco D'Andrea, Respondents

Duty of Fair Referral — Evidence — Practice and Procedure — Unfair Labour Practice — Complainant seeking to adduce evidence to establish hiring hall records altered by respondent union — Board exercising discretion to permit evidence despite inadequate particulars — Permission made subject to conditions specified by Board

BEFORE: Robert D. Howe, Acting Chairman, and Board Members F. W. Murray and W. F. Rutherford.

APPEARANCES: *Ed J. Brogden for the complainants; A. M. Minsky, R. D'Andrea and D. D'Andrea for the respondents.*

DECISION OF THE BOARD; June 19, 1984

1. The purpose of this decision is to provide in written form the following unanimous oral ruling given by the Board on June 13, 1983 concerning these consolidated complaints, as jointly requested by counsel for the complainants and counsel for the respondents:

Mr. Brogden, as counsel for the complainants, seeks to adduce through witness Daniel Rankin evidence that will allegedly establish that certain records of the respondent trade union (the "Union") have been altered. In

particular, he seeks to adduce the originals of three referral slips issued by the Union to Cecil Iacobelli, Frank Taglione, and Mario Galista, on April 3, 1981, February 18, 1981, and January, 15, 1981, respectively. Mr. Brogden has advised us that he will also be seeking to introduce the Union's referral books which cover those dates, in an effort to show that those records have been altered. It is Mr. Brogden's submission that this evidence is very relevant in that it will undermine the credibility of the Union's hiring hall records which have been filed with the Board in this matter, including the 71 books of referral slips for the period from May 25, 1981 to October 5, 1983. Mr. Minsky, as counsel for the respondents, objects to the introduction of this evidence on the grounds that the complainants have not complied with the requirements of section 8 of the *Statutory Powers Procedures Act* and section 72 of the Board's Rules of Procedure.

In complaints alleging violations of section 69, a union's hiring hall records are obviously very important documents. In the instant case, as in the *Joe Portiss* case which preceded it, the complainants are attempting to demonstrate through specific impugned referrals that Local 1089's hiring hall has been operated arbitrarily, discriminatorily, or in bad faith. The referral slips and other hiring hall documents are an integral part of that institution, and are one of the primary sources of information concerning its operation. It is apparent from Mr. Minsky's cross-examination of witnesses who have been called by the complainants that the respondents will be relying upon those documents in defending these complaints. If those documents are unreliable because of alterations that have been made by the respondents in anticipation of these proceedings or other similar Board proceedings, that would be a significant factor to be taken into account by the Board in assessing the weight, if any, to be given to such documentary evidence.

Subsections (2) and (4) of section 70 of the Board's Rules of Procedure give the Board a discretion to consent to a party adducing evidence of alleged improper or irregular conduct, or other material facts, notwithstanding a party's failure to particularize such matters in a timely fashion. In exercising such discretion, the Board is empowered to give its consent upon such terms and conditions as it considers advisable.

We have given this ruling much anxious consideration in that the situation falls very close to the line, there being considerable merit in each of the positions urged upon us. We are quite troubled by the stage in these already lengthy proceedings at which the complainants have chosen to raise this matter. However, having regard to all of the circumstances, we are prepared to consent to the evidence in question being adduced, on the following terms:

- (i) these proceedings will be adjourned at the completion of Mr. Brogden's examination-in-chief of Mr. Rankin, if so requested by Mr. Minsky, in order to afford him an opportunity to review these matters with his clients and to prepare for his cross-examination concerning them; and
- (ii) Mr. Brogden must undertake to produce for cross-examination all of

the previous witnesses whom Mr. Minsky wishes to cross-examine concerning these three referral slips.

Those terms will eliminate any prejudice to the respondents. In that regard, we also note that by permitting this evidence to be adduced we are not expanding the period for which compensation may be awarded to either of the complainants if a breach of section 69 is established. We are only permitting it to be adduced on the basis that it may arguably assist the Board in determining the reliability of the union's hiring hall records concerning the particular referrals which form the subject matter of these consolidated complaints. Moreover, this ruling is expressly limited to the aforementioned three referral slips, and the referral books from which they were issued. Should questions arise in respect of the admissibility of other evidence concerning the reliability of hiring hall documents, we will deal with them on an individual basis at the appropriate time.

2271-83-U London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., Applicant, v. **Gordon-Nelson Development Company Limited**, Respondent

Lock-out — Practice and Procedure — Witness — Employer raising financial difficulties as defence to allegation that contract out and lay-off constituting lock-out — Union entitled to sub-poena arguably relevant financial and business documents to test defence — Information not privileged as confidential

BEFORE: R. O. MacDowell, Acting Alternate Chairman, and Board Members J. Wilson and S. Cooke.

APPEARANCES: *Randy Levinson and Charles P. Davidson for the applicant; Robert A. Macpherson, George Takach and R. S. Gordon for the respondent.*

DECISION OF THE BOARD; June 20, 1984

I

1. The name of the respondent is amended to read: "Gordon-Nelson Development Company Limited".
2. This is an application filed under section 93 of the *Labour Relations Act*. The applicant alleges that the respondent employer has engaged in an unlawful lockout. Section 72(1) of the Act reads:

Where a collective agreement is in operation, no employee bound by the agreement shall strike and no employer bound by the agreement shall lock out such an employee.

The term lockout is defined in section 1(1)(k) as follows:

“lock-out” includes the closing of a place of employment, a suspension of work or a refusal by an employer to continue to employ a number of his employees, with a view to compel or induce his employees, or to aid another employer to compel or induce his employees, to refrain from exercising any rights or privileges under this Act or to agree to provisions or changes in provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, an employers’ organization, the trade union, or the employees.

[emphasis added]

3. The hearing of this application began on January 30, 1984, and was continued on March 28, March 29, April 25, and April 30. During the course of the hearing, the Board issued a subpoena directing the production of certain documents. The respondent challenged the propriety and scope of that subpoena. The Board ruled that the material sought was arguably relevant to the matters in dispute and directed that the documents be produced. The respondent declined to do so. The respondent took the position that it was not prepared to produce the documents requested under any circumstances, or for any purpose, until directed to do so by a Court. The purpose of this interim decision is to set out the background and basis for the Board’s ruling so that the applicant can seek such remedy as may be available to it to compel compliance with the Board’s subpoena.

4. We will begin by briefly discussing the legal question raised in this application and some of the testimony adduced at the hearing. In order to assess the potential relevance of the documents in question, it is necessary to appreciate the case which the applicant must make, the respondent’s “defence”, and the scenario which prompted the applicant to seek the production of particular material. Of course, since the proceeding has not yet been completed, we make no factual or legal findings other than those strictly necessary to deal with the employer’s refusal to respond to the subpoena.

5. Section 72 prohibits unions and employers from threatening or imposing economic sanctions during the currency of a collective agreement. The agreement is intended to be a peace pact. Once its terms have been settled, neither bargaining party is entitled to use its economic strength in an effort to get “a better deal”. Indeed, so important is this principle, that all collective agreements must contain a mutual no strike/no lockout pledge and the Act provides special procedures for dealing with unlawful strikes or lockouts. There is no dispute here that there is a valid and subsisting collective agreement. In addition, and quite apart from the collective agreement, the *Hospital Labour Disputes Arbitration Act*, (“HLDA”) prohibits strikes or lockouts in nursing homes. Thus, if the employer’s conduct constitutes a “lockout” within the meaning of the Act, it will necessarily be an illegal one.

6. It will be seen from a perusal of section 1(1)(k) of the Act that not all closings, suspensions of work, or refusals to employ will constitute a “lockout” within the meaning of the Act. There must not only be a refusal to employ (etc.), but, in addition, that refusal must

be undertaken with a view to compel or induce the employees to forego rights under the Act or agree to changes in their terms and conditions of employment. In the classic case an employer withholds work opportunities to induce his employees to make concessions — just as the employees may collectively withhold their labour in order to achieve concessions for themselves. The former situation is a “lockout”. The latter is a “strike”. And, as we have already noted, in no circumstances can such activity take place during the term of a collective agreement, or in an enterprise to which the *HLDA* applies.

7. The parties have had a collective bargaining relationship since June 1977, when the applicant was certified as the employees’ bargaining agent. There has never been a negotiated collective agreement. The collective agreements between the parties have all been the result of compulsory interest arbitration, pursuant to the *HLDA*, which prescribes arbitration as the required alternative to industrial conflict.

8. The recent bargaining history need not be reviewed in detail. It suffices to say that the previous collective agreement expired in March, 1981. The current collective agreement is based upon an arbitration award by Professor Gorsky issued in August, 1982. That arbitration award applies only to the respondent. The respondent did not participate in a process of joint negotiation with other nursing homes in the London area. Those other nursing homes, including one named “Meadow Park Nursing Home”, bargained together and, upon impasse, went before another arbitrator. He issued his award in March, 1982 — some five months before the Gorsky award. Professor Gorsky was urged to follow the pattern. He declined to do so. In consequence, the terms in the Gorsky award are somewhat more generous. Not surprisingly, this is a matter of some concern to the respondent. The applicant’s position is that if the respondent wished to achieve local parity, it should have participated in the joint negotiations with the other homes.

9. Following release of the Gorsky award, the respondent refused to abide by its terms or incorporate them into a collective agreement. The existing collective agreement was eventually ordered into effect pursuant to the terms of the *HLDA* (see section 5). The respondent still did not comply. It took the position that the *Inflation Restraint Act* announced September 28, 1982, and proclaimed December 15, 1982, rendered the earlier arbitration award void.

10. The status of the Gorsky award was canvassed before an arbitrator (P. C. Picher) constituted under the agreement, and also before the Inflation Restraint Board. In August, 1983, both tribunals rejected the employer’s position. They held that agreement was valid and binding for its designated term from March, 1981 to March, 1983, as well as for the additional one-year extension period to March, 1984 prescribed by the *Inflation Restraint Act*. However, since the employer had never been paying the rates prescribed in the award, it immediately found itself liable for a substantial sum in respect of retroactive and unpaid wages. That merely complicated what the respondent characterized as an already difficult economic situation.

11. Witnesses on behalf of the applicant testified that Mr. R. S. Gordon, the administrator and part-owner of the respondent, notified a number of employees that they would be laid off, but indicated that the layoff would be cancelled if the employees were prepared to accept a wage reduction to the level paid at Meadow Park Nursing Home — that is the rate prescribed by the other arbitrator and the position which Professor Gorsky ultimately rejected in his own arbitration award. C. P. Davidson, a union official, testified that Mr. Gordon told him that the layoff would be cancelled and employees could have their jobs back, if the employees were prepared to reduce the wage rates to the Meadow Park level, *and* pay back all of the retroactivity which they had been paid following the failure of the respondent’s challenge to the Gorsky

award. When no agreement from the union was forthcoming, some employees had their hours reduced and at least one who was not prepared to accept the reduction in hours was laid off. In the union's submission the employer has imposed economic sanctions because the employees refused to give up rights which had been established in the arbitration award. Having failed to persuade Professor Gorsky of the merits of its position, and having failed in its legal challenge, the employer has now "locked out" its employees to achieve its bargaining goals.

12. The union points out that the respondent has not reduced the scope of its activities as might be the case in a "normal" layoff, nor has it reduced its demand for the health care and dietary services formerly performed by the union members whose hours have been reduced. The employer has reduced the hours of employees in the bargaining unit and increased its use of a subcontractor who supplies employees to perform the work. The employer is able to obtain the services of those substitutes at an hourly rate substantially less than that paid to the bargaining unit employees. In the union's submission, this is not a case where the work is not available; rather, it is a situation where the respondent has refused to employ bargaining unit members to do such work because they, in turn, rejected the respondent's demand to forego wage rates and retroactive wage payments to which the employees were entitled by virtue of the Gorsky award and their collective agreement. There was also testimony that, even after the wage reduction, a member of the respondent's management told an employee that her hours could not be increased until she acceded to Mr. Gordon's demand. The union asserts that both elements of the lockout definition have been met: there has been a refusal to employ its members, and the purpose of such refusal was to compel them to accept a reduction to the Meadow Park wage level and repay their retroactive wages. The lockout is merely an extension of the previous bargaining and is unlawful. It is an effort to secure what the respondent failed to achieve at the bargaining table or in the arbitration process prescribed by law. If the union cannot strike to improve upon the terms in the Gorsky award, the employer cannot lock out employees to achieve a change to its advantage.

II

13. The nursing home in London is one of three nursing homes run by the respondent in various Ontario communities. However, the London nursing home occupies the same building as a "rest home" also operated by the respondent. These two parts of the business operate under a different regulatory framework but they have a number of common facilities or shared services. According to Mr. Nelson, a co-owner of the company, the various phases of the business are treated as independent divisions or profit centres, each of which is expected to be financially viable in its own right. But Gordon-Nelson Development Company Limited is a private company and Mr. Nelson testified that there are no separate financial statements for its various aspects. In the case of the London facility, costs are apportioned between the nursing home and the rest home on the basis of a formula or "rule of thumb". Mr. Nelson did not indicate whether, over all, and considering the potential appreciation in the value of its capital assets, management fees, salaries and so on, the company as a whole could be considered profitable or successful.

14. The respondent denies that there has been a lockout. The respondent denies the statements attributed to Mr. Gordon. The respondent claims that it was merely responding to the economic consequences of the Gorsky award. The respondent asserts that there is no clause in the collective agreement restricting its right to subcontract bargaining unit work, and further that it has been doing so for some years without protest from the union. In the respondent's submission, all that has occurred here is an increase in its utilization of the

subcontractor's employees in order to effect cost savings. The respondent asserts that it is in a regulatory "bind": the prices it can charge its residents are strictly controlled by the government, while, at the same time, it cannot freely negotiate the wages of its employees using such bargaining power as may be available to it. It must accept the revenues which the legislation allows, and pay the wages which the statutory arbitrator requires — even if those wages may be above what would be paid on a "free collective bargaining" basis. To meet this dilemma, it has decided to increase its use of the subcontractor's services.

III

15. The first witness called on behalf of the employer was R. H. Nelson, one of its co-owners. He was not directly involved in the day-to-day administration of the nursing home, but professed a general understanding of the financial difficulties faced by the home which, he said, prompted its decision to reduce the hours of bargaining unit employees and substitute the services of the employees of a subcontractor. In direct examination he testified that, after the Gorsky award, he concluded that the home would never be able to operate on a sound financial basis. He said this pessimistic assessment was confirmed by the company's accountant. The home had been in a precarious position since the first arbitration award in 1978. There had been a history of financial difficulties. The Gorsky award was merely the "last straw". Something had to be done. It was necessary to reduce costs. A layoff of bargaining unit members and increased utilization of the subcontractor were the only viable alternatives.

16. In the early part of Mr. Nelson's cross-examination (which took place over several days with some weeks in between), he testified that there were a number of mortgages outstanding on the nursing home with different mortgage companies. He could not recall the amounts or servicing charges. He was not aware of any management fees applicable to the nursing home and payable to the respondent company. He was unsure if there was any formal agreement with the subcontractor to supply services and he was not aware of any payment schedule. He could not recall the amounts of profit or loss, if any, incurred in recent years by the company as a whole or the London nursing home. Nor could he recall the amount of the anticipated saving in wages which, he said, was the reason for reducing the employees' hours. He said that the home might lose \$50,000 that year so that some management response was imperative. He indicated that there were audited financial statements for the company, but no specific subdivision or breakdown for the nursing home and he was reticent about revealing the details of the company's financial affairs. He said that a reduction to the Meadow Park rate — the respondent's position before arbitrator Gorsky and the concession which the union alleges was sought in the fall of 1983 — would not make very much difference to the overall viability of the nursing home.

17. The initial hearings concluded without completing Mr. Nelson's cross-examination. Following that hearing, the applicant requested, and the Board issued, a subpoena directed to Mr. R. Gordon requiring the production of certain financial and business documents. The subpoena was properly served. The documents related to the subcontracting arrangement and the financial situation of the home — that is, those matters which the respondent was asserting prompted its decision to reduce the employees' working hours and which Mr. Nelson had testified about in his direct evidence. The applicant's counsel proposed to put those documents to Mr. Nelson for his identification and to ask questions about them. The documents sought are described in Schedule "A" of the subpoena which reads as follows:

- 1) all notes, memoranda, correspondence, drafts of contracts and contracts

relating to the contractual relationship between Nel-Gor Castle Nursing Home with Para-Med Health Services;

- 2) all internal notes and memoranda including but not limited to any financial arrangements between Nel-Gor Castle Nursing Home and Nel-Gor Castle Rest Home, including agreements with respect to service contracts; and including any documents or correspondence concerning agreements between Nel-Gor Castle Nursing Home and Gordon-Nelson Development Company Limited including but not limited to leasing, financing and service arrangements;
- 3) any other communication with any other party relating to the aforementioned contracting out of work;
- 4) all financial statements, annual reports and any other financial report of Gordon-Nelson Development Company Limited and Nel-Gor Castle Nursing Home for the years 1981, 1982 and 1983;
- 5) copies of all mortgage documents concerning mortgages between Nel-Gor Castle Nursing Home or Gordon-Nelson Development Company Limited and Morguard Trust, William Clarfield and Hedgco Investments;
- 6) copies of all communications between the Ministry of Health and the Ministry of Labour including but not limited to copies of correspondence as set out in the letter dated November 1, 1983 from Gordon-Nelson Development Company Limited to the Ministry of Health; and
- 7) copies of the exact amount of retroactive pay owing to employees pursuant to the Gorsky award.

The respondent's principal concern is with the material described in paragraph 4. The other documents either do not exist or were not produced.

18. There is no dispute that Mr. Gordon was properly served with the subpoena, or that, as a co-owner and the administrator of the nursing home, he could have control and be able to produce such documents mentioned in Schedule "A" as may exist. Mr. Gordon has been present to advise counsel throughout these proceedings and will be one of the witnesses called by the respondent in its defence. Mr. Nelson would also be expected, in the ordinary course, to be able to identify and explain the financial statements concerning his business. He has already given evidence about the company's financial affairs. The union claims that, once the respondent has raised the question of its financial position, the union is entitled to these business documents to test that defence — particularly where, as here, Mr. Nelson's recollection was less than perfect. The union argues that it need not accept, as true, *viva voce* statements concerning the financial health of the business when such statements were markedly lacking in detail. It is entitled to cross-examine the employer's witnesses on their assertions, and to have the business records available for that purpose.

IV

19. Following the receipt of the subpoena, the respondent did produce a document (exhibit 10) which purported to set out its current revenues and expenditures together with certain cost projections based upon different degrees of utilization of the subcontractor's employees. Counsel advised that this document was prepared for the purposes of this litigation based upon journals, bills, receipts, and other raw financial data. The figures could then be compared to the wages established in the collective agreement. However, the document presented did not constitute an audited financial statement for this or any previous year, nor was the complainant content to simply accept it without question. For example, it disclosed a projected loss (revenue minus expenses) of almost one hundred thousand dollars — twice the sum which Mr. Nelson had mentioned on the previous day. Moreover, when the hearing resumed, the respondent advised that there were not several mortgages on the premises, as Mr. Nelson had testified, but rather one consolidated mortgage. Mr. Nelson's recollection was apparently inconsistent with the respondent's own documentary evidence. The union argued, again, that once the respondent had put its deteriorating financial position in issue as the purported reason for reducing the hours of its employees, the union was entitled to test that assertion in cross-examination and to require the production of such financial records as might bear out or contradict the witnesses' oral evidence. The union argued that it was entitled to see the company's audited financial statements.

20. The Board agreed. It was the respondent which put its financial situation in issue. It was the respondent which asserted that its decision to lay off and reduce the hours of employees was not motivated by an intention to secure economic concessions or induce employees to give up established rights, but rather a response to deteriorating business conditions. It is the respondent which put in a document which purports to be accurate but which it not entirely consistent with its own witnesses' recollection on the previous day. It is the respondent which refuses absolutely to produce its audited financial statements, or make clear the economic dilemma which, it says, motivated its conduct. The respondent does not say that its financial situation is irrelevant, yet it refuses to produce the only independent and pre-existing material — the company's financial statements — which might put its assertions into their proper economic perspective.

21. The respondent contended that the records in question are "confidential". It is said that a private company such as the respondent should not have to make public its annual financial statements. But the documents in question, or the information in them, are not privileged in a legal sense. Nor is the production of such material unusual in a case where a company's financial affairs may be relevant — even though a litigant may be reluctant to produce them. In *Riddick v. Thames Board Mills*, [1977] 3 All E.R. 677 (C.A.), Lord Denning had this to say (at page 687):

Discovery of documents is a most valuable aid in the doing of justice. The court orders the parties to a suit, both of them, to disclose on oath all documents in their possession or power relating to the matters in issue in the action. Many litigants feel that this is unfair. I have often known a party, faced with such an order, saying to his solicitor: 'Need I disclose this document to the other side? It will damage our case greatly if they get to know of it.' The solicitor's answer is, and must be: 'Yes, you must disclose it, however much it damages your case.' Again I have known a party to say to his solicitor: 'But these are my own confidential papers, my own personal

diary, our own inter-departmental memoranda. Must I disclose them?' The answer of the solicitor again is: 'Yes, you must disclose them.' Confidential information has no privilege from disclosure: see *Alfred Crompton Amusement Machines Ltd. v. Customs & Excise Comrs (No. 2)*. The court insists on your producing them so as to do justice in the case.

The reason for compelling discovery of documents in this way lies in the public interest in discovering the truth so that justice may be done between the parties. That public interest is to be put into the scales against the public interest in preserving privacy and protecting confidential information. The balance comes down in the ordinary way in favour of the public interest of discovering the truth, i.e. in making full disclosure.

While these remarks pertained to the discovery stage of civil proceedings, and there is no exact Labour Relations Board equivalent, the public policy considerations are the same.

22. This does not mean that a party is entitled to go on a fishing expedition or use the power of the Board to obtain disclosure for a purpose other than the litigation itself. Again the words of Denning, L.J. are instructive:

Compulsion is an invasion of a private right to keep one's documents to oneself. The public interest in privacy and confidence demands that this compulsion should not be pressed further than the course of justice requires. The courts should, therefore, not allow the other party, or anyone else, to use the documents for any ulterior or alien purpose. Otherwise the courts themselves would be doing injustice. Very often a party may disclose documents, such as inter-departmental memoranda, containing criticisms of other people or suggestions of negligence or misconduct. If these were permitted to found actions of libel, you would find that an order for discovery would be counter-productive. The inter-departmental memoranda would be lost or destroyed or said never to have existed. In order to encourage openness and fairness, the public interest requires that documents disclosed on discovery are not to be made use of except for the purpose of the action in which they are disclosed. They are not to be made a ground for comments in the newspapers, or for bringing a libel action, or for any other alien purpose. The principle was stated in a work of the highest authority 93 years ago by Bray J:

'A party who has obtained access to his adversary's documents under an order for production has no right to make their contents public or communicate them to any stranger to the suit: nor to use them or copies of them for any collateral object. . . . If necessary an undertaking to that effect will be made a condition of granting an order.'

Since that time such an undertaking has always been implied, as Jenkins J said in *Alterskye v. Scott*. A party who seeks discovery of documents gets it on condition that he will make use of them only for the purposes of that action, and no other purpose. The modern authorities are well discussed by Talbot J in *Distillers Co. (Biochemicals) Ltd. v. Times Newspapers Ltd.*,

and I would accept all he says, particularly as to the weighing of the public interests involved.

This approach was recently adopted by this Board in *Shaw-Almex Industries Limited* [1984] OLRB Rep. Apr. 659 with the following comment:

In our view, there is an implied undertaking by a party to whom documents are produced as a result of the use of summons *duces tecum* issued by the Board. It is an undertaking to the Board as much as to the party from whom production is compelled. The undertaking is that the documents will not be used for collateral or ulterior purposes. The undertaking is similar in scope and effect to the undertaking discussed in the cases cited above. Breach of the latter undertaking is a contempt of court, as is the breach of any undertaking given to a court. By virtue of section 13(c) of the *Statutory Powers Procedures Act*, breach of an undertaking to the Board may be the subject of contempt proceedings in the Supreme Court of Ontario; that court's power to punish for "contempt of the Board" is not limited to cases of failure of witnesses to attend, testify or produce documents: *Re Ajax and Pickering General Hospital et al. and Canadian Union of Public Employees et al.* (1981) 32 O.R. (2d) 492 (Ont. Div. Ct.); reversed on other grounds at (1982) 35 O.R. (2d) 293; 82 CLLC ¶14,164 (Ont. C.A.).

While all of these cases relate to production at discovery or prior to trial, and different considerations may relate to documents properly admitted at a public hearing, it is our view that there is sufficient protection for the respondent against any abuse of the Board's subpoena, and, where, as here, arguably relevant documents are sought, they should be produced. With respect to the respondent's concern about confidentiality, we might note that this issue is addressed in section 9(1)(b) of the *Statutory Powers Procedure Act* dealing with *in camera* hearings. By implication, it does not relieve a party of the obligation to disclose such matters.

23. For the foregoing reasons then we are satisfied that the financial documents sought by the union, and particularly those described in paragraph 4 of the subpoena, are arguably relevant to the issues in these proceedings and should, therefore, be produced. The admissibility of those documents and the weight (if any) that should be given to them, is a matter for argument at the hearing. The respondent's blanket refusal to produce this material under any circumstances, makes the Board's original order to produce academic. The fact is that the respondent refused to do so then, and has indicated that it will continue to refuse. The propriety of that refusal will be for the Court to decide, as well as the remedy — given that a litigant who takes this position will at the very least produce a delay potentially prejudicial to the other party. At this point, it suffices to direct that the documents in question be deposited forthwith with the Registrar of the Board, so that they will be available for inspection upon reasonable notice, and for the continuation of the hearing in this matter.

0229-84-R Association of Allied Health Professionals: Ontario for and on behalf of its chartered Local Association #3, Applicant, v. The Religious Hospitallers of Saint Joseph of the **Hotel Dieu of Kingston** and Kingston General Hospital, Respondents

Sale of a Business — Transfer of pediatric facilities resulting in transfer of part of applicant's bargaining unit to purchaser hospital — Board determining "like bargaining unit" under s.63(4) resulting from sale — Holding purchaser's pre-existing paramedical employees not swept in to unit

BEFORE: Corinne F. Murray, Vice-Chairman, and Board Members J. Wilson and C. A. Ballentine.

APPEARANCES; *Thomas Stefanik and Sandy Nicholson for the applicant; D. L. Brisbin and Michael W. Carty, Q.C. for Hotel Dieu; Don Halpert and Noreen Ismaily for Kingston General.*

DECISION OF THE BOARD; June 26, 1984

1. This is an application pursuant to section 63 of the *Labour Relations Act* wherein the applicant seeks a declaration that there has been a sale of a part of the business from the respondent Kingston General Hospital (hereinafter "KGH") to the respondent the Religious Hospitallers of Saint Joseph of the Hotel Dieu of Kingston (hereinafter "Hotel Dieu") and a declaration that Hotel Dieu is and has been since April 9, 1984 bound by the current collective agreement between the applicant and KGH.

2. The facts are not in dispute. The applicant and KGH are bound by a collective agreement whose term is July 1, 1982 to June 30, 1984. The recognition clause therein is as follows:

ARTICLE 2: RECOGNITION AND SCOPE

2.01 The Employer recognizes the Association as the bargaining agent of all paramedical employees of the Board of Governors of the Kingston General Hospital, commonly known as Kingston General Hospital at Kingston and their assistants, save and except supervisors, persons above the rank of supervisor, students employed during the school vacation period, persons regularly employed for less than twenty-two and one-half (22 1/2) hours per week, and persons covered by subsisting collective agreements.

2.02 Definition

(a) "Employee" means an employee of the Kingston General Hospital for whom the Association is the recognized collective bargaining agent.

(b) "Executive Director" means Executive Director of the Kingston General Hospital.

- (c) A full-time employee is defined as an employee who is normally scheduled to work thirty-seven and one-half (37 1/2) hours per week.
- (d) A regular part-time employee is defined as an employee who is normally scheduled to work and works less than thirty-seven and one-half (37 1/2) hours per week but not less than twenty-two and one-half (22 1/2) hours per week on the basis of an annual average.
- (e) A casual part-time employee is defined as an employee who is normally scheduled to work and works less than twenty-two and one-half (22 1/2) hours per week on the basis of an annual average.

- 2.04 Paramedical includes all audiologists, dietitians, health records administrators, occupational therapists, pharmacists, physiotherapists, play therapists, psychologists and psychometrists, social workers, speech pathologists, vocational rehabilitation counsellors, and their assistants.

The paramedical personnel working in the KGH pediatric facilities were a part of this bargaining unit which included other paramedicals working in other areas of KGH. Sometime in early 1984, steps were taken to transfer the pediatric facilities of KGH to Hotel Dieu. On April 9, 1984, the first transfer of an employee (an audiologist) covered by the above-noted collective agreement occurred. Three speech therapists were transferred on June 4, 1984 and six employees in the Child Development Centre were transferred to Hotel Dieu on June 9, 1984. There are approximately two more transfers of paramedical personnel from pediatrics yet to be effected. Hotel Dieu's paramedical personnel are not represented by any bargaining agent. There is no evidence that Hotel Dieu had or has any pediatric facilities besides those transferred from KGH. If Article 2 of the applicant's collective agreement with KGH were applied in the context of Hotel Dieu, there would be approximately 20 persons in the applicant's bargaining unit in addition to those transferred from KGH. These 20 are paramedical personnel who have been providing care to adult patients at Hotel Dieu.

3. The applicant requests a declaration that Hotel Dieu and all of its paramedical personnel described in Article 2 above are bound by the collective agreement currently in effect between KGH and itself. The respondent Hotel Dieu does not oppose this application but it also does not consent to it. Neither respondent called any evidence or disputed any of the facts as stated by the applicant. No one appeared or made representations on behalf of the 20 persons who could potentially be "swept" into the applicant's bargaining unit. Notice to Hotel Dieu's employees regarding this application was posted at the premises of Hotel Dieu in conformity with the Board's procedures. In composing this Notice, the Board reproduces pertinent segments of the application. Due to the oblique way in which this application was drafted, the Notice did not clearly reveal that the applicant was, through this application, seeking to expand its representation rights to include paramedical personnel employees at Hotel Dieu prior to April 9, 1984.

4. There is no evidence before us that the applicant gained its status as bargaining agent through certification or recognition. While there is a collective agreement binding upon KGH as of April 9, 1984 (the date the applicant says the sale, for labour relations purposes, took place) the applicant and KGH were entitled to give notice of their desire to bargain pursuant

to section 53(1) from April 2, 1984. The applicant gave Hotel Dieu notice to bargain on April 9, 1984.

5. Section 63 provides in part:

63.-(1) In this section,

(a) "business" includes a part or parts thereof;

(b) "sells" includes leases, transfers and any other manner of disposition, and "sold" and "sale" have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights too which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

(3) Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or has given or is entitled to give notice under section 14 or 53, sells his business, the trade union, or council of trade unions continues, until the Board otherwise declares, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement or the renewal, with or without modifications, of the agreement then in operation and such notice has the same effect as a notice under section 14 or 53, as the case requires.

(4) Where a business was sold to a person and a trade union or council of trade unions was the bargaining agent of any of the employees in such business or a trade union or council of trade unions is the bargaining agent of the employees in any business carried on by the person to whom the business was sold, and,

(a) any question arises as to what constitutes the like bargaining unit referred to in subsection (3); or

(b) any person, trade union or council of trade unions claims that, by virtue of the operation of subsection (2) or (3), a conflict exists between the bargaining rights of the trade union or council of trade unions that represented the employees of the predecessor employer and the trade union or council of trade unions that represents the employees of the person to whom the business was sold,

the Board may, upon the application of any person, trade union or council of trade unions concerned,

- (c) define the composition of the like bargaining unit referred to in subsection (3) with such modification, if any, as the Board considers necessary; and
- (d) amend, to such extent as the Board considers necessary, any bargaining unit in any certificate issued to any trade union or any bargaining unit defined in any collective agreement.

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(6) Notwithstanding subsections (2) and (3), where a business was sold to a person who carried on one or more other businesses and a trade union or council of trade unions is the bargaining agent of the employees in any of the businesses and such person intermingles the employees of one of the businesses with those of another of the businesses, the Board may, upon the application of any person, trade union or council of trade unions concerned,

- (a) declare that the person to whom the business was sold is no longer bound by the collective agreement referred to in subsection (2);
- (b) determine whether the employees concerned constitute one or more appropriate bargaining units;
- (c) declare which trade union, trade unions or council of trade unions, if any, shall be the bargaining agent or agents for the employees in such unit or units; and
- (d) amend, to such extent as the Board considers necessary, any certificate issued to any trade union or council of trade unions or any bargaining unit defined in any collective agreement.

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(13) Where, on an application under this section, a trade union alleges that the sale of a business has occurred, the respondents to the application shall adduce at the hearing all facts within their knowledge that are material to the allegation.

6. We have decided that there has been a "sale" within the broad meaning of that term under section 63(1) and that part of the "business" of KGH has been transferred to Hotel Dieu. Therefore, the applicant is entitled to a declaration that such sale has taken place. In the absence of any contest by the respondent Hotel Dieu or any evidence being led by it of any other date, we hereby determine that the sale occurred on April 9, 1984.

7. We are not disposed to declare the collective agreement currently in effect to be binding without any determination of what the dimensions of the bargaining unit are. Since the date of the sale falls within the last 90 days of the operation of the collective agreement,

section 63(3) comes into play as well as section 63(2). The significance of section 63(3) is that the Board is empowered under section 63(4) to resolve any question which may arise as to what is a "like bargaining unit" where the sale takes place in the context of the commencement of bargaining for a first or renewed collective agreement. The Board exercises this power because the issue of the extent of bargaining rights following a sale ought not to be a complicating factor in negotiations. We have treated this application as one which raises a question as to what constitutes a "like bargaining unit" because the application would not need to have been made if the applicant and Hotel Dieu had been in agreement on what bargaining unit the applicant represents at Hotel Dieu.

8. The applicant took the position that there was no intermingling as far as it knew, but that it was "not sure of the facts". As mentioned above, the respondent Hotel Dieu led no evidence. The applicant did not insist that the respondent do so to satisfy the onus under section 63(13). In view of this, we find that at this juncture, section 63(6) has no application and the Board therefore has no jurisdiction to exercise the wider powers under that subsection.

9. The Board has repeatedly stated that the purpose of section 63 is to preserve existing bargaining rights. The major distinction between section 63(4) and section 63(6) is that the Board, in subsection (4), is required to determine the "like bargaining unit", whereas in subsection (6), the "appropriateness" of the bargaining unit must also be considered. Section 63(4) requires the Board to track bargaining rights from the predecessor employer to the successor employer. Section 63(6) requires the Board to go further and assess appropriateness because intermingling of employees can create labour relations problems which may be resolved according to the Board's standards of what constitutes an appropriate bargaining unit. Where intermingling has been found, there have generally been circumstances where employees work side by side with different terms and conditions of employment. In *Bermay Corp. Ltd.*, [1979] OLRB Rep. July 608, the Board stated at pp. 612-613, the major purpose behind section 63(6):

17. ... While Section 55 (now 63) of the Act operates to protect the bargaining rights of those employees and their union it also provides a mechanism to balance their interest with the interest of the respondent's former employees and new employees who work side by side with them.

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18. An obvious concern in the resolution of the conflict that arises upon the intermingling of employees who have previously been organized with employees who were previously not organized is the interest of the employer to have its industrial relations conducted within the framework of a rational bargaining structure.

Where numbers warrant, representation votes are held to resolve which of two bargaining agents ought to represent the larger "appropriate" unit or to resolve whether the employees in the larger unit wish to be represented by any bargaining agent at all. Where it is clear from the proportions that one bargaining agent should represent the larger unit and swallow up the smaller unit without violating majoritarian principles, the Board has made a declaration under section 63(6)(a) that the employer/purchaser is no longer bound by a collective agreement with the bargaining agent represented by the unit so swallowed up (see *Silverwood Dairies*, [1980] OLRB Rep. Oct. 1526 at pp. 1535-1538 for a complete review of the fact situations which have produced representation votes in intermingling situations). Therefore, subsection

(6) allows for the adjustment and sometimes the extinguishing of existing bargaining rights (see *Bermay Corp. Ltd.* [1980] OLRB Rep. Feb. 166 at pp. 171-172), whereas subsection (4) is primarily concerned with continuing the bargaining rights so that a sale would not have the effect of diminishing or expanding bargaining rights of the union or unions affected (see *Beechgrove Regional Children's Centre*, [1978] OLRB Rep. Aug. 76 for an elaboration of the distinction between an accretion to the bargaining unit and an expansion of the bargaining unit in the context of section 63).

10. In this instance we find that the applicant is not entitled by reason of the "sale" to representation rights with respect to a bargaining unit which would include the 20 individuals who would be circumscribed by the recognition clause of Article 2, if it were literally applied to the circumstances at Hotel Dieu. Since section 63(1)(a) contemplates that a part of a business may be sold, it is clear that part of a bargaining unit may also be transferred as a result of a sale. A part of the bargaining unit which the applicant represented at KGH has been removed through the transfer to Hotel Dieu of the KGH's pediatric facilities and only a portion of the applicant's bargaining rights go with it. The applicant's bargaining rights continue or are preserved only with respect to paramedical personnel working in pediatrics. To include the 20 paramedical employees previously employed by Hotel Dieu as part of a bargaining unit represented by the applicant would have the effect of *extending* the applicant's bargaining rights. This is not a fact situation where there has been an accretion to the bargaining unit (see *Beechgrove Regional Children's Centre*, *supra*). Therefore the Board declares the applicant to be the bargaining agent for:

All paramedical employees of The Religious Hospitallers of Saint Joseph of the Hotel Dieu of Kingston and their assistants working in the pediatric unit or area, save and except supervisors, persons above the rank of supervisor, students employed during the school vacation period, persons regularly employed for less than twenty-two and one-half (22 1/2) hours per week, and persons covered by subsisting collective agreements.

11. In summary, the Board hereby declares:

- (1) there has been a sale of that part of KGH's business dealing with pediatrics to Hotel Dieu effective April 9, 1984;
- (2) the composition of the bargaining unit represented by the applicant at Hotel Dieu is:

All paramedical employees of The Religious Hospitallers of Saint Joseph of the Hotel Dieu of Kingston and their assistants working in the pediatric unit or area, save and except supervisors, persons above the rank of supervisor, students employed during the school vacation period, persons regularly employed for less than twenty-two and one-half (22 1/2) hours per week, and persons covered by subsisting collective agreements.

- (3) the collective agreement referred to in paragraph 2 of this decision is binding on Hotel Dieu and Article 2 thereof is hereby modified to reflect the extent of the applicant's bargaining rights as set out above.
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0594-83-R The Labourers' International Union of North America, Local 1059, Applicant, v. **The John Hayman & Sons Company Limited** Ontario and King Limited, Respondents

Related Employer — Employer using affiliate company to attract non-union contractors — Not used as scheme to defeat union's bargaining rights — No transfer of work or employees to affiliate company and no erosion — Although conditions for declaration satisfied Board not exercising discretion

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members C. A. Ballentine and I. M. Stamp.

APPEARANCES: *M. Zigler and J. MacKinnon for the applicant; Peter J. Thorup, Carmen McClelland, Bob Hayman and George Hayman for the respondents.*

DECISION OF N. B. SATTERFIELD, VICE-CHAIRMAN AND BOARD MEMBER I. M. STAMP; June 14, 1984

1. The applicant Labourers' International Union of North America, Local 1059 ("Local 1059") is seeking a declaration that there has been a sale of a business within the meaning of section 63 of the *Labour Relations Act* between the respondents and a declaration under section 1(4) of the Act that they carry on associated or related activities or businesses under common control or direction and constitute one employer for purposes of the Act. Standing behind this application is a referral of a grievance in the construction industry under section 124 of the Act (Board File No. 0732-83-U), the further processing of which must await the disposition of this application.

2. The respondent John H. Hayman & Sons Company, Limited ("Hayman") has carried on a business in the construction industry in the London area since 1887 and was incorporated in 1913. During the last ten years it has operated as both a general contractor and a sub-contractor, primarily on concrete and masonry construction.

3. The respondent Ontario and King Limited ("Ontario and King") was incorporated in February 1981 for the purpose of holding real estate formerly owned by Hayman so as to keep the real estate separate from the construction business. Ontario and King earns income from rental properties.

4. The respondents admit that they are under common control or direction but contend they do not carry on related or associated activities and, if the Board finds that they do, the Board, pursuant to its discretion under section 1(4) of the Act, should not declare that they be treated as constituting one employer for purposes of the Act. That was the main emphasis of the respondents' defense to the application. They contend also that there has been no sale of a business between the two respondents within the meaning of section 63 of the Act.

5. The applicant is relying primarily on its claim that the respondents should be treated pursuant to section 1(4) of the Act as constituting one employer and, in the alternative, is relying on its claim that there has been a sale of a business between them. In this respect, the Board is of the view that section 63 of the Act has no application to the evidence before the Board in this case. Therefore, in so far as this application relates to section 63 of the Act, it is dismissed.

6. The parties were substantially in agreement on the facts which are material to this application. Where that was not the case, the Board has weighed the testimony of the witnesses and assessed their general demeanor and relative credibility in order to resolve the conflicts in the evidence.

7. The respondents' contention that Hayman and Ontario and King do not carry on related or associated activities is based on the fact that Ontario and King earns income from the real property which it holds, has no employees and, apart from holding real estate, its only activity is bidding on construction projects. The Board is satisfied on the uncontested facts that, not only are Hayman and Ontario and King under common control or direction as admitted, they carry on related activities or businesses and the Board so finds. Their activities, on the evidence, are closely related and Ontario and King's bidding and sub-contracting activities which are closely integrated with those of Hayman, produce revenue for Ontario and King. Therefore, Hayman and Ontario and King not only carry on related or associated activities, those activities are clearly businesses too. Thus the only issue is whether the Board should exercise its discretion under section 1(4) of the Act to declare that they be treated as one employer for purposes of the Act. The facts relevant to that issue are set out below.

8. Hayman has been a "union" contractor for a long time. Where in this decision the term "union contractor" is used it shall mean a contractor which is in a collective bargaining relationship with and employs members of a building trades union. Hayman was amongst the first two or three contractors in London to grant voluntary recognition to building trade unions and did so with the carpenters, bricklayers and labourers. At the times material to this application, it was bound to provincial agreements with six trades: bricklayers, carpenters, cement masons, labourers, operating engineers and rodmen. Whenever Hayman employed these trades on industrial, commercial and institutional ("ICI") construction, it did so pursuant to a collective agreement, either by direct hire or by sub-contracting work to specialty contractors which were in collective bargaining relationships with the appropriate one of those trades. Hayman was not contractually bound to sub-contract other kinds of building trades work to unionized specialty contractors, but did so as a matter of practice. It is what the building trades refer to as a "fair" contractor. That remained Hayman's practice until shortly before this application was made.

9. As a general contractor Hayman is either invited to bid on jobs or, on general tender jobs, it applies to bid. In either case, it invites bids, in other words it gets prices, from specialty contractors employing various construction tradesmen. Being a union contractor it has traditionally attracted bids from union specialty contractors. According to Robert Hayman, who together with his brother, George, controls the respondents, during the 1950's and 1960's there were only a few non-union specialty contractors in the London area so it was always possible to get three or four bids for each trade from union specialty contractors. During the same period there were 10 to 15 union general contractors which would bid on most of the available construction work. This pattern changed substantially through the 1970's when there was a significant increase in the number of new general and specialty contractors in the area which were "non-union". By the time this application was made only four of the major general contracting firms based in the London area were unionized. Consequently, Hayman found that its competition for available jobs was coming increasingly from non-union general contractors. It found also that non-union sub-contractors would tender bids only to non-union general contractors and, when Hayman asked for bids from them, it would not receive any. Hayman's experience was that it could not attract bids from the non-union specialty contractors. On the other hand, the union specialty contractors would tender bids to the non-union general contrac-

tors. Robert Hayman claims that the ability of the non-union general contractors to attract bids from both sides of the fence gave them a substantial advantage when bidding on jobs valued in the range of \$2,000,000 to \$3,500,000.

10. Hayman continued to be unsuccessful on general tender jobs in getting non-union specialty contractors to tender bids to it. Eventually, in 1980 Hayman was second low bidder by a slight margin on a public sector job of a type which historically had not been available to non-union contractors. Hayman had bid the job with a complete slate of union specialty contractors. The low bidder was a non-union general contractor and four of the specialty contractors it used were non-union. According to Robert Hayman, if he had been able to attract the same bids from those contractors, Hayman would have been the low bidder. That experience convinced the Hayman brothers that Hayman would have to devise a way of attracting bids from and using non-union specialty contractors.

11. Their decision was to use Ontario and King to bid general tender jobs which were open for bidding to union and non-union firms alike. They placed two specific obligations on Ontario and King. First it must sub-contract to Hayman all of the work which Hayman had historically performed with its own forces; this was primarily reinforced concrete and masonry construction. Hayman, for its part, was committed to perform that work pursuant to the terms of the provincial agreements of the trades with which it had collective bargaining relationships. Second, Ontario and King would not bid jobs where the work was fully unionized. The Hayman brothers expected that Ontario and King would be able to do what Hayman had been unsuccessful in doing, that is, attract bids from non-union specialty contractors.

12. Ontario and King began bidding general tender jobs in March 1981 but was not successful as low bidder until July 1982 when it won the contract for the St. Thomas Sewage Treatment Plant on which it was low bidder by approximately \$16,000 on a total bid of approximately \$2,200,000. The difference was attributable primarily to Ontario and King being able to attract a bid from a non-union mechanical contractor. Hayman does not do mechanical work. Its consistent practice has been to sub-contact it to a mechanical contractor. Ontario and King sub-contracted to Hayman all of the concrete work on the project and Hayman used labourers on this work. Robert Hayman's evidence that the labourers did all of the work which they would have performed had Hayman been the general contractor instead of Ontario and King was confirmed by the evidence of Richard Weiss who was the business representative for Local 1059 when the job was executed. This result is not surprising if the intent of the Hayman brothers that Ontario and King sub-contract to Hayman the work which it had historically done and that Hayman perform that work pursuant to its collective bargaining obligations was to be carried out, since Hayman supervised this job for Ontario and King, as it did for another job which Ontario and King subsequently obtained.

13. The next job won by Ontario and King was an extension to the White Oaks Mall, a London area shopping mall. Hayman had been general contractor on the prior extension in 1978. The price of the job was negotiated between the owners, through their agent, and Ontario and King. Hayman was approached first in late summer 1982 on an informal basis and gave an oral bid on the foundation work alone, on the basis of the owner proceeding with that work first and independently from any other work. That did not happen and Hayman was approached by the owners' agent in early 1983 with orders for some preliminary work. Robert Hayman proposed to him that the owners engage Ontario and King and have greater flexibility in pricing by being able to attract bids from union and non-union specialty contractors on work which

Hayman usually let to sub-contractors. The owners ultimately signed a contract with Ontario and King on February 8, 1983 for the foundation and shell of the mall building.

14. The value of the contract was nearly \$3,000,000. Ontario and King sub-contracted to Hayman the work it had historically performed and sub-contracted to specialty contractors the work which Hayman usually let out. Hayman supervised the project for Ontario and King, performed the foundation, concrete floor, masonry and carpentry work with its own forces using the union trades which it customarily employs. Hayman sub-contracted the excavation work to a union contractor. Eighty-five per cent of the value of the Ontario and King contract was performed by building trades union members. At the time of the hearings into this application Ontario and King appears to have been the successful bidder on two smaller jobs, but they had not been executed yet.

15. When Ontario and King bids on or performs a job, bid and performance bonds, insurance and building permits are issued, accounts rendered to clients and payments made to sub-contractors in the name of Ontario and King. Its name appears on the signs displayed at job sites. Hayman's name is not used by Ontario and King for any of these purposes with respect to Ontario and King bids or jobs.

16. Hayman has continued to bid in that part of the construction market where it sees itself belonging. The jobs which Hayman has been successful in bidding since Ontario and King started bidding have been ones where union contractors were specified. It has performed these jobs using union trades either directly employed or by sub-contracting to unionized contractors. When Hayman is invited to tender a bid on a job it does so in its own name and not in Ontario and King's. On general tender jobs which would be expected to attract a significant number of bidders, Ontario and King will bid because past experience has shown that Hayman would not likely be successful. Occasionally Hayman will submit a bid on the same general tender job as Ontario and King. Ontario and King does not bid on jobs which Hayman considers to be its part of the market.

17. Hayman did face challenges from the building trades unions about the bidding arrangement between Hayman and Ontario and King. One incident resulted in a settlement agreement dated April 25, 1983 between Ontario and King, the London and District Building Trades Council and certain of its constituent trade unions, including Local 1059, in which the trade unions through their agents agreed not to engage in unlawful strikes or picketing at the White Oaks Mall and Ontario and King agreed to invite and accept bids from union sub-contractors as well as non-union ones. Hayman and Ontario and King were able as well to reach written accommodations on their bidding practices with the bricklayers, carpenters, operating engineers and rodmen unions. Ontario and King has assured those unions that it will sub-contract to Hayman all of the work which Hayman has done in the past and Hayman has assured them that it will perform the work which it had done historically and pursuant to the applicable provincial agreement with those trades. The undertaking prohibits Ontario and King from sub-contracting concrete and masonry work to a contractor other than Hayman. The Haymans were prepared to have Ontario and King undertake in writing with Local 1059, as well, that Ontario and King would sub-contract to Hayman all of the work Hayman had been doing as a general contractor and sub-contractor pursuant to the labourers provincial agreement and its predecessor agreements. Local 1059 declined to enter into any agreement and chose to pursue this application, which it was at liberty to do.

18. Local 1059 is not concerned about the erosion of its bargaining rights with Hayman solely with respect to concrete and masonry construction. Whether or not that work is adequately safeguarded by the undertakings of the Hayman brothers, Local 1059 is concerned about what it claims is labouring work associated with work performed by specialty contractors, union or non-union. James MacKinnon, secretary-treasurer of Local 1059 and the officer responsible for administering its affairs, testified that certain work which was commonly performed by members of Local 1059 in the London area was performed on the White Oaks project by employees of sub-contractors who were not its members. The Board heard testimony about local area practice with respect to this work from MacKinnon, Richard Weiss, Local 1059's former business representative, and Louis Lenssen, superintendent for Hayman on the White Oaks job. Lenssen has worked in construction for 35 years, the last 24 years with Hayman. It is clear from the evidence of Lenssen and Weiss that there have been on-going, conflicting claims in the London area between Local 1059 and a number of the specialty trades for jurisdiction over the work which was the source of Local 1059's concern. The Board prefers Lenssen's evidence with respect to the prevalent local practice and how the work in question was performed on the White Oaks project. He was not present when the other witnesses gave their evidence, his evidence was specific and unshaken in cross-examination. Except for Robert Hayman, who was not directly involved with supervision of the White Oaks project, Lenssen was by far the most experienced of the witnesses with respect to London area construction work practices. His evidence, with respect to the work which MacKinnon claimed was commonly performed by members of Local 1059, was that the predominant practice in the London area was for such work to be performed by employees of the speciality trades contractors rather than by members of Local 1059. Hayman conformed to that practice on the White Oaks job. The Board is satisfied on the evidence that, if the sub-contractors did not execute the work in question with their own forces, members of Local 1059 employed by Hayman performed the work and charged the cost back to the sub-contractor. This applied whether it was a Hayman job or an Ontario and King job.

19. While the evidence before the Board was sufficient to decide that issue, it has chosen not to identify the specific nature of the work at issue because this is not a jurisdictional complaint. In a jurisdictional complaint, the Board would normally have more extensive and more specific evidence about local area practice than was necessary here. Therefore, the Board's findings with respect to Local 1059's claim is not to be taken as a conclusive finding with respect to local area work practice.

20. An application like this one in which it is alleged that two distinct legal entities carry on related activities or businesses and should be treated as one employer for purposes of the Act calls into play two subsections of the Act. These are subsections 4 and 5 of section 1 which provide as follows:

(4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

(5) Where, in an application made pursuant to subsection (4), it is alleged that more than one corporation, individual, firm, syndicate or association or any combination thereof are or were under common control or direction, the respondents to the application shall adduce at the hearing all facts within their knowledge that are material to the allegation.

Robert Hayman's testimony was forthright and refreshingly candid and fully satisfied the evidentiary onus imposed by section 1(5). The fact that the critical facts were so substantially in agreement is in a very large measure attributable to his total demeanor as a witness. Applicant counsel acknowledged in his argument Mr. Hayman's refreshing candor as a witness, a point with which respondent counsel readily agreed. That is about the extent of agreement between the two counsel, however, because they are at 180 degrees to one another on their interpretation of the facts. Applicant counsel contends that the facts describe the classic erosion of bargaining rights which section 1(4) was designed to shield against and cry out for the exercise of the Board's discretion to declare that the respondents be treated as one employer for purposes of the Act. Respondent counsel argues on the other hand that, if ever there was a case where the Board should not make such a declaration, it is on the facts of this case. Their diametrically opposite positions only serve to show the pivotal significance of the facts in this case to its ultimate determination.

21. The Board's decision in *Industrial-Mine Installations Limited*, [1972] OLRB Rep. Dec. 1029 refers to the general purpose of section 1(4) as being to avoid the frustration of acquired bargaining rights or of an attempt to acquire them. How the Act meets that purpose is described succinctly nearly ten years later in the Board's decision in *Ethyl Canada, Inc.*, [1982] OLRB Rep. July 998, at paragraph 37:

37. Section 1(4) of the Act deals with situations where the economic activity giving rise to the employment is or can be carried out through more than one legal entity. In such circumstances an alteration in legal form, or a transfer of work from one legal entity to another, can undermine established collective bargaining rights. Section 1(4) ensures that the institutional rights of the trade union and the contractual rights of its members, will attach to a definable commercial activity rather than the particular legal vehicle(s) through which that activity is carried on. Legal form is not permitted to obscure economic and collective bargaining realities. In this respect section 1(4) creates a regime of collective bargaining law which significantly modifies common law notions of privity of contract or the corporate veil. However, while the language of section 1(4) is very broad, the section is not intended to apply in every case which in a general or linguistic sense meets its statutory criteria. The Board has a discretion concerning the application of section 1(4) and, in the past, it has exercised that discretion carefully, in light of the circumstances of each case, and labour relations policy considerations.

The Board's decisions in the ten years intervening those two decisions show the Board to have considered a variety of factors in deciding the exercise of its discretion:

- (1) whether the applicant is seeking to acquire bargaining rights by means of section 1(4) in order to avoid the certification procedures of the Act;
- (2) whether a declaration would disturb existing bargaining rights;

- (3) whether a declaration would interfere with the interests and rights of employees to select their own bargaining representative or to remain unrepresented;
- (4) whether the application has been made within a reasonable time after the applicant became, or with reasonable diligence, should have become aware that the two or more entities were closely related; and
- (5) whether a scheme exists which would effectively defeat bargaining rights by transferring work from one related entity to another.

See the Board's decision in *Acto Builders (Eastern) Limited*, [1979] OLRB Rep. June 465 and the cases referred therein at paragraph 15.

22. Ontario and King does not have any employees at all, let alone any who are construction labourers, so there are no bargaining rights which would be disturbed if the Board declares the two respondents be treated as one employer. Nor are there any employees whose interests would be interfered with if the applicant is successful. That success, however, would allow the applicant to achieve bargaining rights for prospective construction labourers should any be hired by Ontario and King, something it could not achieve by means of certification now because Ontario and King has no employees who are construction labourers. The question of whether the application was brought within a reasonable period of time after the applicant became aware of the close relationship between the respondents is an issue raised by counsel for the respondents as ground for the Board declining to exercise its discretion. The Board is satisfied on the evidence that Local 1059 was aware of Ontario and King's existence and relationship to Hayman early in Ontario and King's bidding activity and it was aware not later than the St. Thomas job of the undertaking of the Hayman brothers that the corporation Hayman would continue to perform on any job obtained by Ontario and King the construction work it had done in the past using members of Local 1059 as it had done in the past. Local 1059 appears to have been willing to take a "wait and see" posture with respect to the St. Thomas job. Its perception of the way Ontario and King/Hayman conducted the White Oaks job, however, was that its members lost work which customarily they would have done on a Hayman job. That is when Local 1059 acted to bring this application. While the Board's findings of fact disagree with the applicant's perception, we are satisfied that it has been diligent and acted promptly. In the result, consideration of the first four factors set out above raises nothing which would deter the Board from exercising its discretion to declare the two respondents be treated as one employer. Whether the Board should so declare rests, therefore, on the fifth factor. Has the entry of Ontario and King into the construction business and the way Hayman and Ontario and King have operated in tandem to bid and execute general tender jobs created a scheme which would effectively defeat Local 1059's bargaining rights for Hayman's construction labourers?

23. Counsel for the parties herein have referred the Board to many of its reported cases which have been decided since *Industrial-Mine* as authorities supporting their respective arguments as to how the Board should decide that question. As the Board pointed out in its decision in *Kustom Insulation Ltd.*, [1979] OLRB Rep. June 531, many of these cases involve the transfer of work which would have been performed by the union company to its associated non-union company (*Evans-Kennedy Construction Limited*, [1979] OLRB Rep. May 388); or the transfer of employees from the union to the non-union company (*Evans-Kennedy*, *supra*; *Inducon Construction of Canada Limited*, [1975] OLRB Rep. April 399); or coincident

with the erosion of bargaining rights, the unionized employer's business has declined as the non-union employer's business expands (*Farquhar Const. Ltd.*, [1978] OLRB Rep. Oct. 914; *Elwall and Sons Construction Limited*, [1978] OLRB Rep. June 535). The facts in this case do not put it amongst those examples. There has been a transfer of bidding activity from Hayman to Ontario and King, but no transfer of work or employees. Hayman has obtained from Ontario and King the same kind of work it has traditionally performed but been less able to attract in recent years. It has performed that work with the same trades directly or by sub-contract as it always has. More specifically, it has employed members of Local 1059 to do the work sub-contracted to it by Ontario and King on the St. Thomas and White Oaks jobs. Hayman's business volume has not declined as a result of Ontario and King acquiring work. Rather Hayman's volume has been protected and possibly enhanced as a result of the transfer of work from Ontario and King. The facts in this case do not support the conclusion that there has been an actual erosion of the applicant's bargaining rights in any of the forms which concerned the Board in the foregoing decisions or by not respecting Local 1059's established work jurisdiction in the London area.

24. The fact that there has been no actual erosion, however, does not obscure the potential which exists for erosion of Local 1059's bargaining rights with Hayman for construction labourers. For example, it is Ontario and King which bears the legal responsibility for the letting of any sub-contracts on the jobs which it acquires. In exercising that responsibility it is not obligated by any direct collective bargaining responsibility to sub-contract to Hayman or any other contractor which is obligated under a collective agreement to employ members of Local 1059. So in that sense the "control" of sub-contracting on Ontario and King jobs is with it and not Hayman, the employer which is bound together with Local 1059 to the labourers provincial agreement. That agreement contains the following limitation on sub-contracting work coming within its scope:

2.05 The Employer agrees to engage only sub-contractors who are in contractual relations with the Union and/or its affiliated bargaining agents for all work covered by this Agreement, or work forming part of an I.C.I. General Contract, except the work described in Schedule "D" hereof.

Therefore, if Ontario and King for any reason decides not to sub-contract to Hayman the concrete and masonry construction work which Hayman has done on its own jobs in the past, Local 1059 has no direct avenue of redress through the provincial agreement because Ontario and King is not bound to it. The potential for erosion of Local 1059's bargaining rights posed by the absence of any contractual obligation on Ontario and King similar to clause 2.05 alone is sufficient reason for the Board to issue a declaration according to Local 1059's counsel. He argues that, in face of similar threats to a trade union's bargaining rights, the Board has exercised its discretion to declare related employers be treated as one employer for purposes of the Act in its decisions in *West York Construction Limited*, [1978] OLRB Rep. Sept. 879; *Kustom Insulation Ltd.*, [1979] OLRB Rep. June 581 and *Donald A. Foley Limited*, [1980] OLRB Rep. April 436.

25. In its *West York* decision the Board was dealing with an application under section 1(4) brought by, amongst others, the International Union of Bricklayers and Allied Craftsmen, Local 2. The related company, Bau Canada Limited, had been dormant since its incorporation more than five years before the application was made. It had been activated to perform as a general contractor for small commercial renovations. That was not the work in which it was engaged when the application was brought, although the job was its first. The two persons who

were equal owners of the two companies were also equal owners of a commercial property. Those persons were acting as their own general contractor in constructing industrial condominium units on the property and engaged Bau as project manager. It supplied the jobsite supervisor who was its only employee on the project. The only other evidence of Bau's activities was that it had let the sub-contract for the supply and installation of masonry on the project. Before declaring that West York and Bau be treated as one employer for purposes of the Act, the Board commented as follows:

11. The Board has some concern about the consequences of granting bargaining rights by means of section 1(4) declaration in a situation where there are no employees in one of the related companies. However, having regard for one purpose of section 1(4) (the protection against the frustration of bargaining rights already earned by a trade union) the Board is concerned that its refusal to grant a section 1(4) declaration in the instant case would leave open to frustration the existing bargaining rights with respect to West York employees. If Bau were to be used to take the same kind of jobs as West York has been doing and then to sub-contract them to contractors other than those permitted by the collective agreement binding West York, then the result would be a circumvention of existing bargaining rights.

The focus of the Board's concern in that case was clearly the sub-contracting activity of Bau and the potential for that activity to result in circumventing existing bargaining rights of the applicants. One of the applicants was the International Union of Bricklayers and Allied Craftsmen, Local 2. The facts show that Bau had sub-contracted the masonry work on the job to a particular contractor. The facts show also that West York was bound to sub-contact only to contractors whose employees were members of the Bricklayers Local 2 and other trade unions affiliated with The Toronto Building and Construction Trades Council, as it was then. It is reasonable to infer from those facts that the Board had in front of it evidence that the limitations placed on West York's sub-contracting of work had been breached already and was concerned about the erosion which would occur by the diversion of sub-contracts from West York through Bau.

26. In *Kustom Insulation, supra*, it was one of two separate legal entities incorporated on the same day, the other one being H. S. Insulation, Inc. The sole owner of H. S. Insulation had operated a business under the name of a third company until the two new companies were incorporated. On that day he sold the third company to Kustom Insulation, of which his wife was sole owner. Kustom did mechanical insulation work on union projects as a unionized contractor the same as its predecessor had done. The value of the work it performed in 1978 was more than 10 times the value of H. S. Insulation's work for that year. H. S. Insulation did both mechanical and house insulation, bidding only to non-union contractors. It had one employee in 1978 and Kustom employed from 10 to 13. The Board found that the two companies, one union and the other non-union, satisfied the legal pre-conditions for a declaration under section 1(4). The Board found for the following reasons that the existence of H. S. Insulation undermined the union's bargaining rights with Kustom and declared that the two companies be treated as one employer:

21. Despite the present well-being of Kustom's business, the Board is of the view that H. S. Insulation is eroding the bargaining rights of the union because it effectively carves out from Kustom's business the work that Kustom might otherwise at least try to get and the work in respect of which

the union would otherwise represent the employees. The existence of H. S. Insulation effectively nullifies the need for Kustom to try to compete with non-union contractors as other unionized employers are required to do. The double-breasted arrangement allows the respondent to avoid the applicant when doing house insulation and some kinds of mechanical insulation which is work which Kustom is fully equipped and able to perform.

27. In *Foley, supra*, Donald A. Foley Limited ["Foley"] was a general contractor primarily engaged in road building. The Board found, even though Foley's owner had no ownership interest in and was not an officer or director of Kingston Aggregates, one of its sub-contractors, the economic reality was that Foley exercised effective control over Kingston Aggregates. It was a non-union company. One of the effects of Foley's economic control of Kingston Aggregates was that the latter company did not need to hold itself out to the public as a business. It had no readily discernible presence on Foley's construction projects on which it was a sub-contractor. The Board declared that they be treated as one employer for purposes of the Act because:

• • •

One of the results of the total relationship between Foley and Kingston Aggregates is that Foley can go on projects as a 'union' contractor and through Kingston Aggregates perform work with non-union labour, with no visible indication of Kingston Aggregate's presence on the project. At the same time, it permits Kingston Aggregates to operate under Foley's umbrella and gain access to large jobs which it would not otherwise be able to do. A potential effect of this practice is to erode the bargaining rights of the applicants. The Board does not have evidence before it that such erosion has taken place, although a strong inference exists from the fact that Foley employed an average combined workforce of 15 engineers and labourers in 1979 while Kingston Aggregates had a workforce of some 30 to 55 employees. It is true that similar risk of erosion would result from Foley entering into a bona fide, arms-length relationship with another non-union contractor and section 1(4) could not protect the applicants. The fact is that it is Foley's control of Kingston Aggregates, a firm carrying on related business, which presents the risk of erosion of the applicant's bargaining rights. It is not necessary for there to have been an actual erosion of those rights before the Board exercises its discretion. As the Board stated in *Kustom Insulation Ltd.*, [1979] OLRB Rep. 531,:

'It is not necessary, however, for the union company to fall apart before concluding that an employer's scheme of operating a business through a union and non-union company has undermined a union's bargaining rights.'

While the respondents argued that there was no scheme or intent to avoid or dilute the applicants' bargaining rights, it is the reality that erosion has resulted or that there is a risk of erosion of bargaining rights which may cause the Board to exercise its section 1(4) discretion to remedy the situation"

28. The instant case can be distinguished on its facts from the Board's decisions in those three cases. There is no intentional scheme to circumvent the labourers provincial agreement or otherwise defeat, dilute or erode Local 1059's bargaining rights. There is no evidence to cause the Board to suspect that Ontario and King has sub-contracted work which Hayman would have performed with labourers to a contractor which has no collective bargaining relationship with Local 1059, as appears to have been the situation in *West York*. Unlike *Kustom Insulation* wherein the Board was concerned with the unionized employer Kustom being diverted by its related non-union business from seeking certain kinds of "... work which Kustom is fully equipped and able to perform.", Ontario and King is being used to obtain for Hayman work which, in recent years, it had been unsuccessful in getting. In *Foley* the Board found that the total relationship between the unionized entity, Foley, and Kingston Aggregates, the non-union one, allowed Foley to "... go on projects as a 'union' contractor and through Kingston Aggregates perform work with non-union labour, with no visible indication of Kingston Aggregates presence on the project.". There is no evidence of that problem existing in the arrangements between Hayman and Ontario and King.

29. There is no evidence before the Board of actual erosion of Local 1059's bargaining rights in the sense that work which was previously performed by Hayman employing its members is now being done by contractors who are not in a collective bargaining relationship with Local 1059. In fact, Hayman/Ontario and King have started to recover some of the kind of work which Hayman had been losing to non-union general contractors. To that extent the arrangement has preserved work for Local 1059's members. Counsel for Local 1059 argued that its members had lost work opportunities because non-union specialty contractors had assigned work for which it claimed jurisdiction to persons who were not its members. The evidence does not support that conclusion. While concern about loss of work opportunities by means of improper assignment of work is an entirely legitimate one, it exists whether unionized or non-unionized specialty trades are employed on Ontario and King jobs. Section 91 of the Act protects Local 1059 when it has a legitimate claim to a work assignment whether the work at issue is being performed by persons other than its own members.

30. The emergence of Ontario and King as a bidding and sub-contracting agent for Hayman has erected a legal entity through which the work of Hayman could be carried out. Clearly it has not been used in that manner, however. There has been no transfer of work from Hayman to Ontario and King. Nor has Ontario and King acted or attempted to divert to contractors not in a collective bargaining relationship with Local 1059 work which its members would otherwise have performed, either as employees of Hayman or employees of a sub-contractor engaged by Hayman. To the contrary, the evidence points more to a conclusion that Ontario and King has been used to preserve work for Hayman. In essence, the two entities have conducted business in a manner which, were Ontario and King bound to the provincial agreement, would not have given Local 1059 cause to enforce clause 2.05, the sub-contracting clause of the provincial agreement. In effect, the evidence does not support a conclusion that Hayman, through its arrangement with Ontario and King, has circumvented the labourers provincial agreement or has defeated, diluted or eroded Local 1059's bargaining rights. In these circumstances the Board is satisfied that, as yet, neither the institutional rights of Local 1059 nor the contractual rights of its members have been disturbed by the arrangement between Hayman and Ontario and King.

31. Accordingly, in all of the circumstances of this case, the Board declines to declare that The John Hayman & Sons Company, Limited and Ontario and King Limited be treated as one employer for purposes of the *Labour Relations Act*. Should Hayman deviate, however,

from its present business conduct in a manner which would threaten or disturb the institutional rights of Local 1059 or the contractual rights of its members, or allow Ontario and King to do so, Local 1059 would be able to bring a fresh section 1(4) application as soon as it became aware of the changed circumstances. Should there be any issue of timeliness, it would be determined according to when the changed circumstances occurred and when Local 1059 reasonably should have become aware of them.

32. The application for a declaration under section 63 of the *Labour Relations Act* was dismissed for the reasons given in paragraph 5 of this decision.

DECISION OF BOARD MEMBER C. A. BALLENTINE;

1. I disagree with my colleagues. I believe that the Board should exercise its discretion to declare that The John Hayman & Sons Company, Limited and Ontario and King Limited are one employer for the purpose of the *Labour Relations Act*.

2. The preconditions of section 1(4) have been established in this case. It was admitted by Hayman that the companies are associated and are under common control and direction and the Board has declared they carry on related businesses. See paragraph 7 of the majority decision. I concur with that finding.

3. The only reason that the majority have for not declaring them to be one employer is that they find there has been no erosion of the applicant's bargaining rights. I am not satisfied that is so. It is a fact that Local 1059's bargaining rights have not been eroded in regard to three sub-contracts on the "White Oaks" project, namely precast, masonry and concrete forming work which was performed by Hayman engaging members of Local 1059 in accordance with the Labourers' provincial agreement. However, standing behind this section 1(4) case is a referral of a grievance in the construction industry under section 124 of the Act. Local 1059 is alleging in part that the on-site preparation work and the clean-up work covered by its provincial agreement was not performed by its members on the White Oaks project; (it is clear from the evidence that Ontario & King, the prime contractor on this project, had no direct employees).

4. From my experience in the construction industry, it is the general practice that on-site labourers are employed directly by the prime contractor for on-site work including clean-up. This is the case whether it is a general contractor, project manager, or an owner builder, and regardless of whether it is a union or non-union project. This is why I have a strong suspicion that at least in this area the applicant's bargaining rights probably have been eroded by Ontario and King.

5. The applicant in this case has two options as I interpret the majority decision. Firstly, it can wait and see how the Haymans perform in the future. If it finds any violations of its collective agreement on an Ontario and King project it can file with the Board a new section 1(4) application and a grievance under section 124. If the applicant can establish that work normally done by its members was done by others, the Board would be obliged to issue a section 1(4) declaration and declare that Hayman and Ontario and King are one employer for the purpose of the Act. Secondly, it could proceed with the pending grievance under section 124, Board File No. 0732-83-U. However, if it decided on this course, I trust that the quality of its evidence would be better than what it presented in the instant section 1(4) proceeding.

6. It is my finding that there is no justification for this Board to refuse to declare that the two companies are one for the purpose of the Act, considering that the reason given by Hayman for structuring Ontario and King was to stay clear of what is commonly known as the unionized "Mechanical Trades" who have no contractual relations with Hayman, and also considering that Hayman is in a contractual relationship with the "general trades" and bound to their various provincial agreements and has purportedly reached a written understanding as it would relate to Ontario and King projects; therefore, such a declaration would only apply to the applicant union. In the interest of saving time and expenses for the Board and the parties, a section 1(4) declaration should have been issued in this case, that The John Hayman & Sons Company, Limited and Ontario and King Limited are one employer for the purpose of the *Labour Relations Act* and that Ontario and King Limited is bound to the Labourers International Union of America's provincial agreement.

2899-83-U United Food and Commercial Workers International Union, AFL, CIO, CLC, Complainant, v. **Manuel DaSilva Foods Ltd.**, Respondent, v. Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees Union AFL-CIO-CLC, Local 88, Intervener

Arbitration — Change in Working Conditions — Practice and Procedure — Unfair Labour Practice — Displacement certification applications not exempt from freeze provision — Pending dispute as to timeliness of certification application not preventing triggering of freeze — Board not deferring to arbitration — Whether incumbent having status as party to complaint — Discussions between applicant union and employer to settle complaint not breach of incumbent's exclusive representative status

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members B. L. Armstrong and D. Blair.

APPEARANCES: *M. Levinson and Kevin Corporan for the complainant; Bruce Pollock, Ken Ottenbreit and Frank Charron for the respondent; Liana Turrin and Jim Whyte for the intervener.*

DECISION OF THE BOARD; June 20, 1984

I

1. This is a complaint under section 89 of the *Labour Relations Act* alleging a breach of section 79(2) of the Act. The complainant alleges that the respondent has unlawfully altered certain "privileges" or duties of some of its employees, while the complainant's certification application is pending before the Board. In particular, the complainant contends that:

(a) employees were informed that they would have to give notice in writing two weeks in advance if they required time off or wished to change shifts when previously they had been able to do so verbally and without any requirement of advance notice;

(b) employees were told that one Saturday morning every month they would be required to attend a staff meeting when such mandatory Saturday morning meetings had not previously been required; and

(c) the employees were told that they must ask permission to go to the washroom when previously, they had simply been able to have another employee cover for them.

Section 79 of the Act reads as follows:

79.-(1) Where notice has been given under section 14 or section 53 and no collective agreement is in operation, no employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty, of the employer, the trade union or the employees, and no trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees,

(a) until the Minister has appointed a conciliation officer or a mediator under this Act, and,

(i) seven days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator, or

(ii) fourteen days have elapsed after the Minister has released to the parties a notice that he does not consider it advisable to appoint a conciliation board,

as the case may be; or

(b) until the right of the trade union to represent the employees has been terminated,

whichever occurs first.

(2) Where a trade union has applied for certification and notice thereof from the Board has been received by the employer, the employer shall not, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty of the employer or the employees until,

(a) the trade union has given notice under section 14, in which case subsection (1) applies; or

- (b) the application for certification by the trade union is dismissed or terminated by the Board or withdrawn by the trade union.

(3) Where notice has been given under section 53 and no collective agreement is in operation, any difference between the parties as to whether or not subsection (1) of this section was complied with may be referred to arbitration by either of the parties as if the collective agreement was still in operation and section 44 applies with necessary modifications thereto.

2. A hearing in this matter was held in Toronto on April 10, 1984. At that hearing, the Board made certain oral rulings, with reasons, which at the request of the parties it undertook to reduce to writing. Following the hearing, but before the issuance of those written reasons, the employer and the intervener both wrote to the Board to request reconsideration. The requests for reconsideration substantially repeated the representations made at the hearing. Before dealing with those submissions, however, it may be useful to identify the parties in this matter and the context in which the present proceeding arises.

II

3. The complainant is the United Food and Commercial Workers International Union (UFCW). The complaint names L. DeSousa Enterprises Ltd as the respondent employer. The respondent employer's reply, however, identifies the correct name of the respondent as "Swiss Chalet Employers Association on behalf of its member Manuel DaSilva Foods Ltd.". In the intervention, the intervener describes itself as the Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees Union AFL-CIO-CLC, Local 88 and asserts that it represents the employees of the respondent (which again is listed as L. DeSousa Enterprises Ltd.) by virtue of a collective agreement between the Swiss Chalet Employers Association and the Canadian Union of Restaurant and Related Employees. It is a matter of record that, until recently, the Canadian Union of Restaurant and Related Employees, (CURRE) and the Hotel Employees and Restaurant Employees Union (HERE) were two separate and unrelated entities which have appeared from time to time in proceedings before the Board. It was evident to the Board, therefore, that its first task was to sort out the identity of the respondent employer and the correct name of the union which purports to be their current bargaining agent. That is the first question which the Board raised at the hearing.

4. Counsel for the respondent advised the Board that L. DeSousa Enterprises Ltd. should be deleted from the style of cause and Manuel DaSilva Foods Ltd. substituted as the proper and only employer respondent. Counsel explained that Manuel DaSilva Foods Ltd. is a successor franchisee to L. DeSousa Enterprises Ltd. The latter is no longer the employer of the employees affected by this complaint. Although Manuel DaSilva Foods Ltd. is also a member of the Swiss Chalet Employers Association, counsel advised that for the purposes of this proceeding, the Association, as such, should not be treated as the respondent employer. Nor did it seek status as a party.

5. The intervener's request for reconsideration (drafted by different counsel than appeared at the hearing) mentions an entity known as "Foodcorp" which apparently is the p franchisor of the Swiss Chalet outlet run by the respondent Manuel DaSilva Foods Ltd. "Foodcorp" does not appear in any of the pleadings filed. It was not named as an entity with an interest in these proceedings nor did it seek to intervene. It is not a party and does not seek to become one — regardless of any commercial interest it may have in the fate of one of its

franchises. The reference in the intervener's letter is an error — arising, no doubt, because there are other proceedings involving the applicant and intervener which do involve Foodcorp. It was to avoid such errors that the Board sought first to ascertain the proper parties in this case.

6. There are certain other matters which are not substantially in dispute. On February 17, 1984, the UFCW applied for certification as the bargaining agent for the employees of the respondent employer. That application (Board File No. 2686-83-R) is currently pending before the Board. It is one of a series of similar applications respecting various "Swiss Chalet" outlets in Ontario. At the present time, these applications have not been dismissed or terminated. There are ongoing hearings respecting a series of issues (see *infra*) which are common to all of these applications.

7. These cases are not before this panel of the Board, but in order to appreciate the argument of the respondent and intervener in this proceeding, it is necessary to briefly advert to some of the issues which the other panel will have to decide.

III

8. For many years CURRE has been the bargaining agent for the employees of various Swiss Chalet outlets in Ontario. On a number of occasions it has been certified by this Board. Those decisions and certificates are a matter of record. The respondent runs one of the Swiss Chalet restaurants where the employees are represented by CURRE. The most recent collective agreement purporting to bind the employees of the respondent was negotiated between CURRE and the Swiss Chalet Employers Association of which the respondent is now a member. That collective agreement, by its terms, does not expire until November, 1984.

9. The intervener, in its present name and form, results from a purported merger of CURRE and the Hotel Employees and Restaurant Employees Union — an International union also recognized by this Board and representing employees in a variety of business establishments throughout Ontario. The intervener submits that as a result of this merger, it is the successor of CURRE and has "inherited" the CURRE collective agreement. That collective agreement, it is said, binds the employees of the respondent and bars the UFCW's certification application. Section 5(4) of the Act provides that where there is a subsisting collective bargaining relationship and collective agreement, a "raiding" union like the UFCW, may only seek certification during the last two months of that agreement. If the agreement with CURRE is a valid collective agreement, the UFCW's certification application in February is untimely because it has not been made during the two month "open period" prescribed by the Act.

10. The UFCW's position in the certification application is that there is no valid and subsisting collective agreement which would hinder its bid to represent the respondent's employees. The UFCW argues that CURRE was not an independent representative of the employees, but rather a "company union" which was the recipient of employer support. The UFCW relies on section 48 of the Act which read as follows:

48. An agreement between an employer or an employers' organization and a trade union shall be deemed not to be a collective agreement for the purposes of the Act,

(a) if an employer or an employers' organization participated in the formation or administration of the trade union or if an employer or an

employers' organization contributed financial or other support to the trade union. . .

The UFCW's position is that the purported agreement with CURRE is a nullity and cannot be an impediment should a majority of the respondent's employees seek to be represented by another union. There is no "open period" or raiding period restriction. A certification application can be made any time. The UFCW also contests the validity of the merger between CURRE and the Hotel Employees and Restaurant Employees Union.

11. We do not have to make any determination with respect to any of these issues — at least, not at this stage. They will eventually be determined by another panel of the Board. We need only observe that the arguments raised by the UFCW are not patently frivolous, nor without legal foundation — assuming, of course, that it is able to establish the requisite evidentiary basis for them. Those allegations may or may not be substantiated on the evidence, but they are nevertheless substantive. That is why the Board has scheduled a series of hearings to entertain the parties' evidence and representations, and that is why as new certification applications have been filed, they have been consolidated with those already before the Board. If the agreement between CURRE and the Swiss Chalet Employers Association is void, it may affect the timeliness of all of the certification applications and the ability of the intervener to assert its position as the employees' established bargaining agent. These issues, although as yet unresolved, are an important part of the background of this case and put the arguments raised here in perspective.

IV

12. In the instant case, the respondent and the intervener union both take the position that the Board should not enquire into the UFCW's allegation that there has been a breach of the section 79(2) freeze. The respondent argues that section 79(2) has no application where there is an incumbent union and a subsisting collective agreement. To hold otherwise, it is said, would impair the exclusive bargaining rights of the incumbent and intrude upon an established bargaining relationship. The respondent contends that it should not have to deal with two purported representatives of its employees, nor should it have to accede to a restriction of management rights which are not otherwise curtailed by its current collective agreement with the intervener. It would follow from this submission, of course, that despite a pending certification application (and subject perhaps to section 64 of the Act), the respondent could unilaterally alter any aspect of the employment relationship not specifically regulated by the collective agreement and, with the concurrence of the intervener, could even change wages or working conditions expressly spelled out in that agreement. The freeze would be confined to situations in which the employees were not already organized. On a "raid" there would be no obligation to preserve the status quo pending the outcome of the case before the Board.

13. In the alternative, the respondent and intervener submit that section 79(2) of the Act should not apply and/or the Board should not inquire into this complaint because the complainant union's certification application bid is untimely on its face. In their submission, a certification application which does not *ex facie* meet the timeliness requirements of section 5(4) of the Act cannot trigger the section 79(2) freeze and the Board should not entertain this complaint until the timeliness question has been resolved.

14. Finally, the respondent employer and the intervener assert that the collective bargaining relationship — that is, the "status quo" for the purposes of the statutory freeze — is

determined solely by the subsisting collective agreement between them. If there has been a failure to comply with that agreement (which the respondent denies), it is a proper matter for a grievance and arbitration in accordance with the terms of the agreement. The respondent and the intervener argue that their collective agreement is valid until the Board otherwise declares, and that the Board should defer to the grievance-arbitration process which has been established to resolve disputes concerning its interpretation or administration.

15. The position of the complainant UFCW is also fairly straightforward. The UFCW relies on the strict wording of section 79(2). There is an application for certification currently pending before the Board. It has not been dismissed or terminated. It may be that its application for certification ultimately turns out to be untimely. It may be dismissed for other reasons. But while it is pending before the Board, the section 79(2) freeze applies. The section does not distinguish between certification applications where there is an incumbent bargaining agent and those where there is not. The Board has no jurisdiction to decline to enforce the section 79(2) freeze. It cannot disregard the allegation that entrenched employee privileges have been denied or duties altered. The UFCW asks rhetorically: why should statutory rights be prejudiced because the respondent's employees may be temporarily represented by another bargaining agent — particularly when it remains an open question whether there is even a *bona fide* collective agreement applicable to them? It is the UFCW's rights as an applicant union that are at issue under section 79(2) and such rights will not necessarily (although here they are) be coincident with the interests of employees in the bargaining unit. Having met the terms of section 79(2), the UFCW argues that the Board is obligated to entertain this complaint.

16. The UFCW further points out that the language of section 79(2) goes beyond wages or the strict terms and conditions of employment spelled out in a collective agreement — assuming that there is one. It encompasses established employee rights, “privileges” and duties which may not be dealt with in the agreement at all, but which are nevertheless frozen by section 79(2) until the certification application has been disposed of. The use of the term “privilege” in itself connotes a benefit or concession which the employees are accustomed to receiving but which is not an enforceable legal right. Nor is there anything particularly unusual about ascertaining the terms of the employment relationship on the basis of established practice rather than some written document. In the case of an unorganized employer (to which section 79(2) also applies) there would be no collective agreement at all. The incidents of the employment relationship would probably have to be determined entirely by the existing practices. It is this overall pattern, or status quo, which the union asserts must be maintained — not just the terms of the relationship spelled out in the agreement.

V

17. We have considered the submissions of counsel and, on balance, prefer the view enunciated by the UFCW. The purpose of section 79(2) is to preserve the established framework of the employment relationship — including privileges — until an applicant union's certification application has been disposed of. It maintains the status quo while representation questions are being resolved and is intended, primarily, to protect the position of an applicant union. We see no basis for the submission that some certification applications trigger the freeze while others do not. If the Legislature had intended to exempt displacement applications from the ambit of section 79(2), appropriate language could easily have been included to effect that purpose. No such language is present and from a policy point of view, we see no sound basis for distinguishing between unorganized situations where the status quo must be maintained and “raids” where, it is said, the situation can fluctuate. If stability is a desirable objective,

it is equally desirable in both situations. In our view, once the terms of the section have been met, the freeze is triggered. (We leave aside for now, whether there actually has been any change in circumstances which could arguably amount to a breach of section 79(2).)

18. We do not think there is any special significance to the “timeliness” question raised in the certification application. It is but one of many issues which might have to be determined (trade union status is another) and which might result in its dismissal if there is a ruling adverse to the applicant union. That is a matter to be determined by the panel seized with the certification application. We do not think we would be warranted in assuming the outcome one way or the other. Nor is it necessary. All that is required to trigger section 79(2) is an application for certification.

19. There may be cases which are absurd on their face or amount to an abuse of process so that the Board would exercise its discretion under section 89 not to inquire into them. We are not persuaded this is such a case. The questions raised on the certification application(s) are not frivolous or without an arguable legal basis. Similarly, the present complaint discloses at least an arguable (if perhaps innocent) breach of section 79 of the Act. We also note parenthetically that it would be a curious result if it turns out that there is no valid collective agreement and also that there is no statutory freeze to prevent the alteration of the terms and conditions of employment while the case is before the Board.

20. We are not persuaded that the Board should defer this question to arbitration. In the first place, what we are dealing with here are statutory rights under section 79(2), not, strictly speaking, contractual rights under the collective agreement. Moreover, those rights are being asserted by the UFCW, which is not a party to that collective agreement, which is not in a position to invoke the grievance procedure or influence the process by which any grievance might proceed to arbitration and which probably has no status to participate in the arbitration proceeding. By the time of the hearing, CURRE had not even filed a grievance on the employees’ behalf, nor was it able to identify or articulate any contractual basis for doing so. In our view, it would be inappropriate to defer a claim by the UFCW based upon an alleged statutory violation to a private forum where the UFCW’s status is uncertain and which is controlled by the employer and the intervener — both parties adverse in interest to the UFCW in the certification proceeding which triggered the freeze in the first place. Why should the complainant have to depend upon them for its remedy? We also note that section 79(3) contemplates an arbitration option for the resolution of freeze questions arising under section 79(1) and there is no similar procedure contemplated in respect of alleged breaches of section 79(2). The wording of section 79(3), by implication, suggests that section 79(2) questions should be resolved by this Board.

21. In any event, it is by no means clear that arbitration could provide an effective remedy to the complainant in this case or that the alleged alteration of employee duties and privileges would even be an arbitrable matter. The respondent does not concede that its actions constitute a breach of the collective agreement and, when asked by the Board, the intervener could not point to any specific clause upon which a grievance could be based. The only suggestion was that the intervener could wait until an individual defied the employer and was disciplined — for example, by refusing to attend one of the allegedly mandatory Saturday morning staff meetings. The reasonableness of the employer’s position might then be raised, indirectly, in a grievance alleging that the employee had been disciplined without just cause. But why should an employee have to put her job in jeopardy to test the propriety of a change in circumstances to which section 79(2) of the Act might apply?

22. In its request for reconsideration, counsel for the respondent objects to this suggestion which, he says, came from the Board. But it was not the Board that suggested that employees might have to put their jobs on the line in order to test the propriety of the employer's position. It was the intervener, their bargaining agent. If respondent counsel's submission is that this is not the most appropriate way to resolve the issues raised in this case, we agree with him.

23. As of the date of the hearing, no grievance had in fact been filed. The collective agreement was not filed with the Board either, although the intervener had the opportunity to do so. And, as we have already noted, section 79(2) of the Act, by its terms, is *broad*er than the terms of the collective agreement because it extends to employee privileges which may not be covered by the agreement at all. The UFCW does not rely upon there being a specific breach of the agreement but asserts that, in any event, there has been an unlawful alteration of the *status quo* "frozen" by section 79(2). In the UFCW's submission the terms of the purported agreement do not apply to the conduct here in question, and, in any event, there is no valid agreement upon which a claim could be founded.

24. In all the circumstances, we are not prepared to defer to arbitration in a case such as this or to leave the UFCW's claim to the protection of the statute to a process controlled by parties adverse in interest.

25. It may be that while the certification application is pending, the respondent and the intervener will have to reckon with the UFCW and conduct themselves in a manner consistent with the requirements of section 79(2). But we do not think the requirement to preserve the status quo significantly impairs the established collective bargaining relationship or undermines the incumbent union's status as the employees' exclusive bargaining agent. It is, after all, merely an injunction to carry on business as usual. (See: *Spar Aerospace Products Limited*, [1978] OLRB Rep. Sept. 859.) It does not paralyze an employer's operation or prevent the intervener from representing the employees, policing the agreement, or seeking to rectify employee grievances or complaints — whether or not such complaints might technically constitute a breach of the agreement. If there is some friction and uncertainty it results because the same statute which creates the intervener's exclusive bargaining agency also permits a challenge by another union and preserves the status quo while that challenge is being resolved by the Board. And, of course, at this point, we do not have to decide the precise content of the status quo (i.e. what is frozen) and whether there has in fact been a contravention of section 79(2).

VI

26. We turn then to the status of the intervener to participate in the present proceeding.

27. The UFCW claims that the intervener has no legal interest which warrants its participation. The fact that it may be the employees' collective bargaining agent and their exclusive representative in bargaining matters does not make it the custodian of rights under the Act, enforceable at the instance of the UFCW and incidentally affecting those employees. The intervener claims that as the incumbent union and the employees' bargaining agent it has an automatic right to participate.

28. For the purpose of this decision, we are prepared to assume that the intervener represents the respondent's employees for collective bargaining purposes and that until the Board otherwise declares there is a subsisting collective agreement between the respondent and the intervener. What is at issue here, however, are statutory rights under section 79(2) and

the question is: does the intervener have a sufficient legal interest in the prosecution or result of this case to warrant participation in the proceeding?

29. Now, clearly, the intervener has an “interest” in the outcome of this proceeding if that term is used in a colloquial sense. If successful, the UFCW may be able to claim credit for restoring certain employee privileges thereby giving a “boost” to its organizing campaign. That, in fact, is how the intervener characterized the purpose of this proceeding in its reply. But suppose the UFCW is successful and, therefore, is able to claim credit for enforcing section 79(2) of the Act. Is that a sufficient interest to warrant granting the intervener status to participate in this proceeding? We do not think so. It is a commercial or incidental interest rather than a legal one. See *Napev Construction Limited et al.*, [1976] OLRB Rep. March 109, application for judicial review, dismissed 1977.) It is a matter of tactics, saving face or sharing credit, rather than a legal interest in the proceeding which justifies participation as a party.

30. There are no allegations of misconduct against the intervener. The alleged breach of section 79(2) does not involve any actions taken by the intervener. The intervener’s character or conduct are not in issue. No remedy is sought against the intervener. The intervener could not point to anything in its collective agreement which could be altered by the outcome of this proceeding. The complainant seeks no such remedy. The collective agreement will remain intact. This proceeding does *not* prevent the intervener from carrying out its responsibilities as the employees’ bargaining agent, or from seeking to address their concerns through the grievance procedure or otherwise — whether or not such complaints are specifically dealt with in the collective agreement.

31. The intervener does *not* oppose the remedy sought by the UFCW (i.e., a return to the alleged *status quo ante*). Counsel told the Board that the intervener would be quite content with a restoration of these purported employee privileges. Indeed, while she was unable to articulate any contractual basis for a grievance to *require* the employer to restore the status quo, she told the Board that the intervener was investigating to see what could be done to meet the employees’ concerns. On this branch of the case, the intervener did not align itself in interest with the employer, did not deny the UFCW’s factual allegations, and, we repeat, was not opposed to the remedy sought by the UFCW. But if the intervener’s conduct is not in issue and it neither opposes nor is directly affected by the proposed remedy, what is the basis for its assertion of a “right” to participate, call evidence, and cross-examine witnesses? In all the circumstances, the Board ruled at the initial hearing that CURRE did not have status to intervene.

32. The Board is prepared to reconsider this aspect of its ruling. Not only is this largely a case of first impression, but also it arises in connection with a parallel certification proceeding between the parties in which the intervener unquestionably has status. The intervener is not a stranger to the employer-employee relationship which is central to both proceedings. It is the employees’ statutory bargaining agent with the right to represent their interests in collective bargaining matters until the Board otherwise declares. While at this stage it has difficulty enunciating or establishing an interest which would justify its active intervention, it may still be premature to deny it status altogether — even if, in the result, it takes no active position and merely holds “a watching brief”. It would be unfortunate if, as the case unfolded, a concern did crystallize prompting a delay to give the intervener notice, or perhaps even a hearing *de novo*. In situations such as this, the rights of the bargaining agent should probably receive a generous construction. And if the intervener was unable to clearly establish its potential

prejudice, neither was the UFCW able to establish its prejudice should the intervener be permitted to take part in this proceeding. Its tactical concerns are just as irrelevant as those of the intervener. Moreover, such concerns on both sides are minimized by the Board's practice of giving full written reasons for its decisions reviewing the facts and the arguments put forward.

33. In summary then:

1. The Board is satisfied that it should proceed to hear this matter and determine whether there has been a breach of section 79(2) of the Act.
2. The Board is not satisfied that it should refuse to hear the case or defer to arbitration.
3. The Board has some doubt whether, at this stage the intervener has demonstrated a sufficient legal interest in this proceeding to warrant granting it status to participate, the Board is nevertheless prepared to permit such participation.

VII

34. While the Board has ruled that it is prepared to hear this matter, on its merits, this should not be construed as any prejudgment of those merits, nor should it dissuade the parties from their continuing efforts to settle this case without resort to further litigation. It may be that, with a little effort, the parties can amicably resolve the matters in dispute between them without resort to a further hearing. The intervener submitted, however, that there should be no such settlement discussions because any attempt to reach a settlement which will be satisfactory to the UFCW, and the respondent, would involve a breach of section 67 of the Act. We do not agree. The intervener is not the custodian of the statutory rights of the complainant and we see nothing improper in the search for a resolution of this matter which will avoid the necessity of a further hearing. The UFCW is not bargaining with the employer in the sense contemplated by section 67 nor is it seeking to enter into a collective agreement. No doubt employees may benefit if this case is settled but we do not think section 67 precludes such settlement discussions. If the Board, after a hearing, could direct a return to the status quo, we see no reason why the litigants could not agree to some similar and acceptable solution without the necessity of litigation — particularly where, as here, the intervener has already told the Board that it would not oppose the result which the UFCW seeks: a rescission of the requirement for two weeks' notice of shift changes, etc. Finally, we might observe that, compared to the problems raised in the other proceedings involving these parties, the issues in this case are relatively minor. Some acceptable settlement may be possible which will avoid the expense and uncertainty of litigation.

35. This matter is referred to the Registrar for rescheduling.

2618-83-M The City of Mississauga (Transit Department), Employer, v. Amalgamated Transit Union, Local #1572, Trade Union

Arbitration — Reference — Employer making timely referral for expedited arbitration — Timely referral for statutory expedited arbitration not pre-empted by prior initiation of arbitration under collective agreement by union — *Royal York Hotel* court decision distinguished

BEFORE: R. O. MacDowell, Acting Alternate Chairman, and Board Members C. A. Ballentine and W. H. Wightman.

APPEARANCES: *C. E. Humphrey, E. Draycott and R. Stehle for the employer; Paul Falzone, Terry Topps and Ron Whittingham for the trade union.*

DECISION OF THE BOARD; June 28, 1984

1. This is a reference under section 107(1) of the *Labour Relations Act*. The Minister of Labour has referred to the Board a question that relates to his jurisdiction to appoint an arbitrator under section 45 of the Act. The material provisions of section 45 read as follows:

45.-(1) Notwithstanding the arbitration provision in a collective agreement or deemed to be included in a collective agreement under section 44, a party to a collective agreement may request the Minister to refer to a single arbitrator, to be appointed by the Minister, any difference between the parties to the collective agreement arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.

(2) Subject to subsection (3), a request under subsection (1) may be made by a party to the collective agreement in writing after the grievance procedure under the agreement has been exhausted or after thirty days have elapsed from the time at which the grievance was first brought to the attention of the other party, whichever first occurs, but no such request shall be made beyond the time, if any, stipulated in or permitted under the agreement for referring the grievance to arbitration.

(3) Notwithstanding subsection (2), where a difference between the parties to a collective agreement is a difference respecting discharge from or other termination of employment, a request under subsection (1) may be made by a party to the collective agreement in writing after the grievance procedure under the agreement has been exhausted or after fourteen days have elapsed from the time at which the grievance was first brought to the attention of the other party, whichever first occurs, but no such request shall be made beyond the time, if any, stipulated in or permitted under the agreement for referring the grievance to arbitration.

(4) Where a request is received under subsection (1), the Minister shall appoint a single arbitrator who shall have exclusive jurisdiction to hear and determine the matter referred to him, including any question as to whether a matter is arbitrable and any question as to whether the request was timely.

For ease of reference, the parties in this case will be referred to simply as “the employer” and “the union”.

2. Section 45 is a relatively new addition to the Act. It was introduced in 1979 in the wake of widespread concern about the functioning of the grievance-arbitration process, and the efficacy of the arbitration board model envisaged by section 44(2). In July, 1978, the Honourable Arthur Kelly, sitting as an industrial enquiry commissioner, tabled a report which was sharply critical of the cost and delay seemingly inherent in that model. The legislative response was section 45.

3. Section 45 has three main purposes: to expedite the hearing of unresolved grievances, to provide third party assistance in the settlement of grievances (see section 45(6)), and to reduce the cost of arbitrating disputes by making available the statutory alternative of a sole arbitrator, appointed by the Minister, even though the parties’ collective agreement may contemplate a tripartite arbitration board. The amendment was simple, but significant in impact. It enables either party to apply to the Minister for the appointment of a single arbitrator thirty days after a grievance is filed, or following the completion of the grievance procedure, whichever occurs first. On the receipt of such request, the Minister must appoint an arbitrator who is able to begin hearing the dispute within twenty-one days. Grievances involving discharge are dealt with even more expeditiously. And the section 45 route is expressly made available “notwithstanding the arbitration provision in a collective agreement or deemed to be included in a collective agreement under section 44”. The scheme of the Act also contemplates that *either party* to the agreement may resort to the expedited arbitration process (see *Marshall Gowland Manor*, [1982] OLRB Rep. May 707). The employer and the union may both take advantage of the expedited route.

4. Before reviewing the facts in the instant case, it may be useful to set out the relevant provisions of the parties’ collective agreement:

- 6.04 In the event of any misunderstanding or difference of opinion as to the interpretation, application, administration, or alleged violation of this Agreement, including any question as to whether or not a matter is arbitrable, it shall be processed in the following manner:

Step 1

The aggrieved employee, with a Union Steward, and the employee’s immediate Supervisor, or his designate, shall meet to discuss the grievance. Following this meeting, if the grievance is not satisfactorily resolved within two (2) working days, it shall be reduced to writing on an approved form provided for that purpose, properly signed and completed by the employee, and presented to the Department Manager or his designate, then:

Step 2

The aggrieved employee and a Union Steward shall, within a further two (2) working days of the Supervisor’s reply, meet with the Department Manager or his designate. Following this meeting, within a further

two (2) working days, the Department Manager, or his designate, shall give his reply in writing. If not satisfactorily adjusted, then:

Step 3

The Union Committee and the Personnel Manager, or his designate, within five (5) working days of the Department Manager's reply, together with such other representatives as the Company may designate, shall meet to discuss the grievance. At this meeting, an International District representative of the Union may be requested to attend. The Personnel Manager or his designate, shall reply, in writing, within five (5) working days of this meeting.

- 6.05 If a grievance is not settled to the satisfaction of either party to this Agreement by the procedure outlined above, then either party may within seven (7) working days, refer the grievance to arbitration in accordance with the provisions of Article 9.
- 6.06 Any reference to "working days" contained in this Article shall mean Monday to Friday inclusive, but shall not include Statutory or Designated Holidays.

ARTICLE 7 — Discharge Grievances

- 7.01 If a permanent employee is discharged, the matter may be submitted in writing as a special grievance, dated and signed, at Step 3 of the Grievance Procedure. Any such grievance must be submitted within three (3) working days after the employee is discharged. An answer to the grievance shall be given within a further three (3) working days. Thereafter, the arbitration procedure contained in Article 9 shall apply.

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ARTICLE 9 — Arbitration

- 9.01(a) When either the Company or the Union requests that a grievance be submitted to arbitration, such request shall be in writing, addressed to the other party to this Agreement, and at the same time shall advise the name of their nominee to the Arbitration. Within seven (7) working days, thereafter, the other party shall also advise in writing, the name of their nominee to the Arbitration.
- (b) The two (2) nominees selected, in accordance with the above, shall attempt to select, by agreement, a Chairman and if they are unable to do so in seven (7) days, they shall then request the Minister of Labour for the Province of Ontario to assist in selecting a Chairman.
- (c) Notwithstanding the provisions of 9.01(a) and (b) above, either party may request a single arbitrator in accordance with the Ontario

Labour Relations Act, Revised Statutes of Ontario 1980, Chapter 228, Section 45.

5. The facts are not in dispute. On December 29, 1983, the respondent discharged Ralph Smith, one of its employees. The union claims that this discharge was "without just cause". A grievance to that effect was filed on January 9, 1984. After some initial discussions, the employer agreed to waive step 3 of the grievance procedure, and proceed straight to arbitration. At that point, the grievance procedure was exhausted and, in accordance with the terms of the collective agreement, each of the parties had seven working days (i.e. until January 18th) to refer the matter to arbitration. On January 11th, the union invoked the procedure prescribed in the collective agreement, by appointing its nominee to a tripartite arbitration board. On January 17th, the employer made a request for the appointment of a single arbitrator under section 45(3) — that is, *after* it had received notice of the union's appointment of its nominee, but *before* the expiry of the period prescribed in the agreement for the referral of a grievance to arbitration.

6. The employer relies on what it asserts to be the combined effect of sections 45(1) and 45(3). The employer argues that section 45(3) creates what might be described as a "referral window" framed in time. A reference to a single arbitrator can be made no sooner than the end of the grievance procedure, or fourteen days, whichever occurs first, and no later than the time stipulated in the agreement for referring the matter to arbitration. The time window determines the availability of expedited arbitration. If a reference is made while the "time window" is "open", the Minister may appoint a single arbitrator to deal with the case, notwithstanding the arbitration procedures prescribed in the parties' collective agreement. Upon such appointment, section 45(4) vests that arbitrator with exclusive jurisdiction to hear and determine the matter referred to him. But if the time window has closed, the section 45 route is no longer available.

7. The union's position can also be simply stated. The union argues that when it embarked upon the arbitration route prescribed in the agreement, it automatically foreclosed the appointment of a single arbitrator under section 45. Having initiated the "private" mechanism, the statutory alternative is no longer available. The union relies upon the following passage from the decision of the Divisional Court in *Re Hotel, Restaurant and Cafeteria Employees Union, Local 75, and Royal York Hotel* (1983) 42 O.R. (2d) 509:

It is the applicant's contention that the learned arbitrator was in error in his interpretation of the statute. It is submitted that art. 18 sets out the time-limit for submitting a grievance to arbitration and that time-limit had passed when the s. 45(1) request was made. It was further submitted that the arbitrator had extended the statutory time-limit into a period when the arbitration process had been initiated and was pending. It is the contention of the respondent that in order to give efficacy to the provisions of s. 45 (which both parties agree, was enacted for the purpose of providing an expeditious arbitration process), the time limitation for making the referral should receive a liberal construction and that a reference to arbitration should be interpreted to mean a reference to the body which will be dealing with the dispute. As that body had not been constituted when the s. 45 request was made there had not been in the submission of the respondent any referral to arbitration.

In my opinion, the Legislature intended to provide strict time-limits within which a party might make the request provided for in s. 45. In contrast to s. 44(6) of the Act which provides for extensions of time in grievance procedures there is no provision for the extension of the time-limits set out in s. 45(2). We have before us two possible interpretations of that time-limit. In my opinion, a submission to arbitration under either art. 18.6 or art. 18.19 of the collective agreement is a referral to arbitration within the meaning of s. 45(2) of the Act. It seems to me that the plain meaning of the word "referring" in the context of the legislation must be restricted to the initiation of the process by either party. The applicant invoked the arbitration process which in its normal course would continue with the appointment of a board of arbitration, the hearing and the eventual decision. Once the process was invoked by either party, it would appear to be the scheme of the legislation that each would have to abide by it until either settlement or decision. While an extension of time under art. 18 might have extended the time in s. 45(2), the extension under art. 19(2) was not part of the referral to arbitration, but was rather an extension of one of the steps in the arbitration process.

In my view the learned arbitrator was right in stating that s. 45 could not be invoked after the parties had lost the right "to go to arbitration" but he misapprehended the situation when he found that on July 2, 1982, the parties were contemplating going to arbitration. It would appear that he interpreted the section in the manner submitted by the respondent. In my view, the interpretation submitted by the applicant is more reasonable both on the meaning of the words and in the context of the legislation.

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This is new legislation. It is important that other arbitrators appointed under s. 45 be certain of the limits which give them jurisdiction. It may be, as contended by the respondent, that this is not an efficacious result in terms of practical labour relations. If this is so, then statutory amendment would appear to be the only solution.

8. The union submits that the critical words in the above-noted passage are these: "Once the process was invoked by either party, it would appear to be the scheme of the legislation that each would have to abide by it until either settlement or decision". The union argues that if the arbitration process under the agreement is initiated prior to the reference under section 45, it is the private arbitration process which takes precedence — even though a section 45 reference might otherwise be timely. To put the matter colloquially: The party "first off the mark" at the completion of the grievance procedure, chooses the institutional framework for the resolution of grievances. The party that first opts to refer the matter to arbitration determines whether there will be a single arbitrator appointed by the Minister under section 45, or a tripartite board appointed under the terms of the collective agreement. A timely reference under section 45 can be aborted by a prior submission to arbitration pursuant to the arbitration provisions of the collective agreement.

9. The opinion of the Divisional Court obviously requires careful consideration; but, in the employer's submission, it must be read in light of the arguments made in that case, and

the precise issue before the Court for its determination. Again, it may be helpful to review the facts and the terms of the collective agreement there in issue. The agreement language is set out in the Court decision itself, and reads as follows:

18.6 Failing settlement of the grievance at Step 3, the Union may submit the grievance to arbitration, within ten (10) working days from the date of the General Manager's reply at Step 3, as described in Article 19.

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18.9 The other party shall give its written response within ten (10) working days from the receipt of the grievance. Failing settlement of the grievance the party filing the grievance may submit it to arbitration within ten (10) working days from the date of the reply to the grievance.

19.1 Written notification of an intent to arbitrate a grievance, by one party to this Agreement to the other party, shall contain that party's nominee to the board of arbitration. Within ten (10) working days thereafter, the other party shall nominate its member to the board of arbitration in response to the Union so doing.

10. In *Royal York, supra*, the union filed a grievance concerning the reduction in working hours of certain employees. By March 22, 1982, it had made its way to step 3 of the grievance procedure. The next step was arbitration. The terms of the collective agreement provided (in Article 18.6) that *the union may* submit a grievance to arbitration within ten working days, or, alternatively (under Article 18.9), that the party filing the grievance (again the union) may submit it to arbitration within ten working days. In either case, there was a ten-day time limit within which the union had to proceed.

11. The union did refer the grievance to arbitration on April 21st, by appointing its nominee to a board of arbitration as required by Article 19 of the collective agreement. This appointment set in motion the tripartite arbitration mechanism. No objection was taken by the Hotel to the union's failure to observe the ten-day time limit. While the parties were pursuing settlement discussions, the union agreed to an extension of the time prescribed under Article 19 for the appointment of the Hotel's nominee to the arbitration board. At this stage, both parties appeared to be content with the arbitration board mechanism prescribed in their collective agreement. On July 2nd, however, the Hotel purported to make a referral under section 45. The union objected that the time for doing so — that is, the ten-day period prescribed in Article 18 — had long since past, and had not been waived or extended by agreement. The Court sustained the union's objection and found that by July 2nd, the Hotel did not have the right to invoke section 45.

12. The Divisional Court's oral decision is fairly brief, and does not disclose the full argument of the parties to which the Court was responding. However, in our view, the Court was dealing only with a time limit question: whether or not the section 45(2) time window should be strictly construed, and whether a referral by the Hotel beyond that time limit would be a valid one. In the passage cited above, the term time limit is mentioned numerous times. The Court opted for strict construction of the time window and found that the Hotel's reference was untimely. The Court rejected the arbitrator's opinion that the extension of the time accorded to the Hotel for appointing its nominee extended the time for making a section 45

reference. However, we do not think the Court was propounding a rule of institutional pre-emption: that the early initiation of the contractual arbitration process could foreclose a timely resort to the statutory alternative. In our view, that was simply not the issue before the Court, nor can this important conclusion reasonably be gleaned from the statement (itself tentative) upon which the union relies here.

13. We are reinforced in our view by a consideration of the underlying structure and purpose of section 45, which, as we have already noted, was intended to provide a cheaper and faster statutory alternative to the more cumbersome tripartite arbitration board contemplated by section 44(2) of the Act and embodied in many collective agreements. From a policy point of view, it is difficult to accept that the Legislature envisaged a “foot race” wherein the party who makes the first reference to arbitration can control the form of the arbitration mechanism — particularly if it involves a pre-emption of the designated statutory alternative. We can discern no policy reason why a timely resort to the expedited arbitration process in the statute should be short circuited by an action taken under the agreement. Indeed, the opening words of section 45 (“notwithstanding the arbitration provision in the collective agreement”), together with the exclusive jurisdiction accorded to the section 45 arbitrator, suggests precisely the opposite conclusion. The plain words of the statute suggest that a timely section 45 reference is available *regardless* of the arbitration procedure in the parties’ collective agreement (with the possible proviso that if both parties have opted for the private route and have incurred the attendant expense, neither will be permitted to resile from the chosen path — see *Spiers Bros. Ltd.*, [1978] OLRB Rep. Sept. 871). Furthermore, the interpretation urged upon us by the union in this case, could substantially undermine the efficacy of section 45 as a speedy and less expensive arbitration alternative. Finally, although it probably adds nothing to the employer’s statutory rights, we note that Article 9.01(c) of the parties’ agreement itself contemplates a section 45 reference, notwithstanding the availability of a tripartite board under Article 9.01(a). We would be reluctant to embrace an interpretation which flies so clearly in the face of the legislative intent.

14. It was unnecessary for the Court to consider these matters in *Royal York* and, in our view, it did not do so. It was dealing with a more narrow question of timeliness which was all that was necessary to resolve the case before it. In our opinion, the *Royal York* decision simply does not stand for the proposition urged upon us by the union in this case.

15. For the foregoing reason, the Board is of the opinion that a timely application has been made within the terms of section 45(2) and that the Minister of Labour therefore has jurisdiction to appoint an arbitrator under section 45 of the Act to inquire into the Ralph Smith discharge. In our opinion, such appointment is available notwithstanding the steps taken by the union under the arbitration provisions of the collective agreement.

CONCURRING DECISION OF BOARD MEMBER W. H. WIGHTMAN;

I concur with the decision of my colleagues, particularly in view of the language in the parties’ collective agreement. Section 45 has a dual purpose: expedition, and lower cost. Accordingly, a “foot race” of sorts was contemplated — although not the kind referred to in paragraph 13. Section 45 was intended to encourage the speedy resolution of disputes by whatever means, including providing an incentive to more expeditious consensual arbitration. However, if consensual arbitration has been adopted and proceeded with to the point where costs such as cancellation fees have been incurred, to make section 45 pre-emptive would be to defeat the collateral and equally important purpose of lowering the cost of the process.

2540-83-R United Brotherhood of Carpenters and Joiners of America, Local 2041, Applicant, v. **Norben Interior Design Ltd.**, Respondent

Build-up — Certification — Construction Industry — Practice and Procedure — Reconsideration — Notice of application and related Board material mailed to box number provided by union as respondent's address — Fact that mail collected from box only infrequent intervals no excuse for not filing timely reply — Board not reconsidering certificate issued — Build-up claim in construction context failing even if timely reply filed

BEFORE: R. A. Furness, Vice-Chairman, and Board Members B. L. Armstrong and J. A. Ronson.

APPEARANCES: *David Jewitt, Don Guilbeault and Ron Rory McCormick appearing for the applicant; T. C. Barber, R. Engels, Ben Perras and Normand Ouellette for the respondent.*

DECISION OF THE BOARD; June 4, 1984

1. This application for certification was filed on February 3, 1984, and the terminal date fixed for this application was initially February 15, 1984. The terminal date in this matter was extended to February 20, 1984. In a decision dated February 24, 1984, a differently constituted panel of the Board issued a certificate to the applicant with respect to a bargaining unit of carpenters and carpenters' apprentices.

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3. On March 1, 1984, the Board received a reply from the respondent. In that reply, which was dated February 27, 1984, the respondent stated that it had one employee in the bargaining unit and in paragraph 13 it stated:

Shortly before the Application date, the Respondent had two employees working for it at the Metcalfe Place apartment building, corner of Metcalfe and Waverley. However, on the Application Date these men were not employed by the Respondent but rather were employed by the general contractor of that project.

Since the Application Date, the Respondent has embarked on another project in Vanier, Ontario (O.L.R.B. Area 15) with the result that there has been a build-up in the work force to 15 and a further build-up expected within the next week to approximately 20 employees. Due to the nature of the Respondent's contract, it is expected that the work force will remain at this size for approximately 3 years.

And in paragraph 14(3) is further stated:

- (a) The Respondent wishes to call evidence with respect to the late filing of this Reply;
- (b) The Respondent wishes to call evidence with respect to build-up within the bargaining unit for which the Applicant has applied;

- (c) The Respondent requests that a hearing be held in Ottawa as all parties and witnesses reside or work in Ottawa.

This matter came on for hearing in Ottawa before the present panel.

4. At the hearing in Ottawa, the respondent abandoned its position that it had only one employee in the bargaining unit, and restricted its evidence and representations to the late filing of its reply and on the question of the alleged build-up within the bargaining unit in this matter. The Board, therefore, did not hear any evidence with respect to the respondent's allegation that two employees working in Ottawa were not employed by the respondent but were rather employed by the general contractor on the project.
5. The respondent was a registered partnership in Ontario and for this purpose it was required to provide, and did provide, a post office box in Ottawa as its address. The applicant supplied this address and the respondent's telephone number in Thurso in the Province of Quebec for the use of the Board. The respondent also used business cards which provided the same information with respect to the post office box address in Ottawa and the telephone number in Quebec. It was the evidence of the respondent that it first became aware of the communications from the Board when one of the partners visited the post office box in Ottawa on February 23, 1984. The respondent uses an additional address which is the site of its current business operations, together with a separate telephone number at the site. It was the position of the respondent that it uses its telephone number on the site and its office on the site for business purposes. The respondent argued that since it had received the material on February 23, 1984, the Board ought to entertain its reply and ought to give consideration to the build-up principle which it was advancing in this matter.
6. It was the evidence of the respondent that its partners visited the post office box once every one or two weeks, and that in these circumstances it should be permitted to file its reply in this matter. The respondent had two meetings with Donald Guilbeault of the applicant during January of 1984, with a view to signing a collective agreement. In addition, the respondent was aware that the applicant was signing its employees into membership, including Roma Ouellette, the brother of one of the partners, Normand Ouellette. The Board used the telephone number provided by the applicant, which was the telephone number used by the respondent in Quebec. The Board was apparently not successful in contacting either Benoit Perras or Normand Ouellette, the partners of the respondent, at this telephone number.
7. Under section 113(1) of the *Labour Relations Act*, any notice or communication sent through Her Majesty's mails shall be presumed, unless the contrary is proved, to have been received by the addressee in the ordinary course of mail. While this section does not completely answer the question of actual notice; see, for example, *Johnson's Painting Co. Ltd.*, [1983] OLRB Rep. June 919, the respondent has provided a public acknowledgement of its business address in Ontario when it does business in Ontario. The applicant is entitled to rely upon that address and so is the Board. The fact that the partners of the respondent, by their own testimony, visit the post office box and empty it once every one or two weeks is not an answer to the position of the respondent that it did not receive notice of this application. Under the circumstances where a business address is provided for the public, the party which provided that address ignores and fails to advise itself of correspondence does so at its peril. The respondent is not able to hide behind a post office box for the purpose of denying the service of documents upon it. On the evidence before it, the Board is satisfied that the respondent, in fact, had notice of

this application and could have filed a timely reply. Therefore, the Board is not prepared to reconsider the certificate which was issued in this matter on February 24, 1984.

8. In the event that the reply had been filed in a timely manner, the respondent's argument with respect to build-up would have failed. The evidence before the Board indicated that the respondent was engaged in performing acoustical, drywall and insulation work in Vanier, and was working in one of five towers of an apartment project. The respondent is in the process of completing such work with respect to one tower. It anticipates that it will be able to secure the work for the other four towers and anticipates being on the job site for one to two years. The evidence before the Board is that the respondent's work and speed are satisfactory and that it stands a very good chance of securing additional work. The respondent has employed up to twenty-six persons on the job site. However, not all of those persons would be included in the bargaining unit which was determined in this matter.

9. Under section 119(2), in an application for certification under the construction industry provisions of the *Labour Relations Act*, the Board need not have regard to any increase in the number of employees in the bargaining unit after the application was made in determining whether a trade union has met the requirements of section 7(2) of the Act. The purpose of this provision in the *Labour Relations Act*, is to give effect to and to recognize the frequent fluctuations and variations in the number of employees on a construction site. In *J. G. Fitzpatrick Construction Ltd.*, 72 CLLC ¶16,161, and [1972] OLRB Rep. May 485, the Board considered the question of build-up in so far as it relates to the construction industry. At paragraphs 12 and 13, the Board stated as follows:

12. Section 108(2) [now section 119(2)] confers a discretion on the Board with respect to the effect of any increase in the number of employees in the bargaining unit after an application for certification has been made under the construction industry provisions of *The Labour Relations Act*. In the *Deer-Mine Services Limited* case, O.L.R.B. Monthly Report June 1971, p.336, the Board commented upon the comparative shortness of the typical employment relationship in the construction industry and in the *V. K. Melhorn* case, O.L.R.B. Monthly Report, April 1966, p.65, the Board commented that it had not been the usual practice of the Board in construction industry cases to have regard to the "build-up" principle. In fact, the Board has very rarely had regard to the principle of "build-up" in construction industry cases. (See, however, the *Industrial Mine Installations Limited* case, O.L.R.B. Monthly Report May 1968, p.217.)

13. For the most part, in applications for certification filed under the construction industry provisions of *The Labour Relations Act*, where the principle of "build-up" has been advanced for consideration by the Board, the short-term employment features of the construction industry have taken precedence over the representation principle (which has evolved in the context of non-construction industry applications for certification filed with the Board). This representation principle, which has been set forth in the *Frant and Waselovich* case, 57 CLLC ¶18,057; is the task of balancing the right, on the one hand, of persons presently employed to collective bargaining and the right, on the other hand, of future employees to select a bargaining agent of their own choice.

10. In balancing the rights on the one hand of persons presently employed to collective bargaining and the rights on the other hand of future employees to select a bargaining agent of their own choice, the Board has looked to the likelihood of the projected build-up, to the degree of representation by an applicant trade union among the employees presently employed by the respondent and to the present and future employment by the employer of a representative cross-section of occupational classifications. In the instant case with a craft unit there is no doubt that the respondent has employed on the date of the making of this application carpenters and carpenters' apprentices. With respect to the future of the build-up, the increase from the date of making the application to the time when the maximum numbers of persons was employed on the tower by the respondent, is represented by a factor of seven or eight to one. The build-up factor of the *J. G. Fitzpatrick* case was in the order of thirty to one. The issue of build-up, of course, is not to be decided simply on the basis of mathematics. The build-up experienced by the respondent is by no means unusual in the construction industry. The respondent has failed to establish any realistic claim for the consideration of the principle of build-up. It is by no means certain that the respondent will secure any or all of the remaining work on the other four towers. Moreover, any prospective delay in the work may cause the respondent to lay off and perhaps reduce the size of its anticipated work force. In these circumstances, having regard to the factors cited above, the Board is not satisfied that the build-up principle, even if the reply had been filed in a timely manner, would have been established before the Board.

11. For the foregoing reasons, the Board affirms its decision in this matter dated February 24, 1984. The parties are directed to return the certificate and copies thereof to the Registrar so that the name of the respondent thereon may be changed to read "Norben Interior Design Ltd.".

0654-84-R Ontario Public Service Employees Union, Applicant, v. Oaklands Regional Centre, Respondent

Bargaining Unit — Practice and Procedure — Board practice to determine appropriate unit before releasing employee list and level of membership support confirmed

BEFORE: R. O. McDowell, Acting Alternate Chairman, and Board Members F. S. Cooke and F. W. Murray.

APPEARANCES: *Ivor Oram, J. Gardner, Heather Gavin Sampson and Evelyn Coggins for the applicant; Joe Carrier, Gerald Saxton and Barbara Izzillo for the respondent.*

DECISION OF THE BOARD; June 28, 1984

1. This is an application for certification.

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[Paragraphs 2 — 8 finding appropriate unit, membership support etc. and directing vote omitted]

9. This matter came on for a brief hearing before the Board prior to the settlement of the matters in dispute between the parties. At that point, the union challenged the accuracy of the employee list filed by the respondent which the applicant union had not seen prior to the morning of the hearing. Counsel for the respondent expressed a concern about the Board's practice of resolving the employee list and the composition of the bargaining unit prior to the disclosure of the level of the union's membership support. Although there was no specific allegation of "gerrymandering" in this instance, counsel submitted that that was a possibility where only the union knew precisely who had or had not signed membership cards. Counsel submitted that where there were challenges, the Board should disclose the count so that both "parties" would have equal access to this information.

10. The Board declined to do so. The Board's practice is well established as are the reasons for it (see: *Santa Maria Foods Ltd.* [1981] OLRB Rep. Nov. 1618). The order of proceeding envisaged by the statute indicates that the Board should first determine the unit of employees appropriate for collective bargaining and the composition of that unit before making an assessment of the union's level of membership support. The determination of the bargaining unit configuration turns upon objective criteria concerning the employees' duties and responsibilities and their community of interest. We fail to see how the level of membership support has anything to do with those issues nor would its premature disclosure assist in their resolution. Indeed, the release of a tentative count prior to the final settlement of the unit and therefore a revised count, would raise a real possibility of disclosing employee wishes with respect to trade union representation — a matter which is expressly protected by statute (see section 111 of the Act). Finally, the Board notes that this problem only arose initially because the union did not have access to the employee list prior to the hearing. If that is to be the rule, its challenges may necessarily have to be made on less than complete information and therefore appear to the employer to be unfounded. In any event, the Board was not prepared to depart from its practice and reveal the union's level of support prior to the determination of the bargaining

unit configuration. As it turned out, the challenges were withdrawn, and the issue is therefore academic.

11. The matter is referred to the Registrar.
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0890-83-U Douglas G. Poole, Complainant, v. International Union of Elevator Constructors designated employee bargaining agency for and on behalf of its affiliated locals, Respondent

Practice and Procedure — Unfair Labour Practice — Complaint filed 3 1/2 years after events in question — Whether complainant's financial and health problems or misdirection by government offices justifying delay — Board declining to hear complaint

BEFORE: R. A. Furness, Vice-Chairman.

APPEARANCES: *Jeffrey S. Leon for the complainant; Lewis Gottheil, Bill Morran and Norm Hartley for the respondent.*

DECISION OF THE BOARD; June 28, 1984

1. The complainant has complained that he has been dealt with by the respondent contrary to the provisions of sections 68, 69 and 70 of the *Labour Relations Act*, and requests that the respondent and/or the Joint Employment Committee of the Elevator Constructors Industry ("the Committee") established by the Anderson award of February 28, 1974, be ordered to reinstate him to his proper position of seniority and to compensate him for losses suffered by virtue of his being denied the appropriate seniority.

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3. The respondent made two preliminary motions before the Board and argued that the Board ought not to entertain this complaint because of the delay involved in bringing the complaint before the Board and also because of the lack of sufficient particulars in the pleadings as filed.

4. The Board entertained the motions before it and heard evidence with respect to the issue of delay. The matters which are complained about by the complainant arose in February of 1980. This complaint was filed on July 25, 1983, and was initially scheduled for hearing on August 25, 1983. The hearing was adjourned until January 12, 1984, and was adjourned again until May 15, 1984. It is the position of the respondent that a period of three and a half years has elapsed between the time when the complained of acts occurred and the date of the filing of this complaint and that the Board ought not to entertain a complaint where the delay has been three and a half years.

5. The complainant gave evidence that he had not filed this complaint with the Board until July of 1983, because he had been ill and had required surgery which he could not pay for, that he had been short of money because he was unable to obtain adequate work and because he had been misdirected by persons in the Human Rights Commission and at the Ontario Labour Relations Board. The respondent, through William Morran, the business manager of the Elevators Constructors International Union, Local 50, gave evidence that he was aware of the complainant and that he had spoken to him over the telephone on many occasions. Local 50 sent out to employers and to its members a statement which referred to the seniority of each member and asked for any representations with regard to its accuracy. The evidence is that the complainant did not receive one of these forms. However, having regard to the importance of the matter and to the wide-spread circulation of this form, it is difficult to believe that the complainant was not aware of this statement. Mr. Morran testified that the Committee does not keep a written account of its proceedings and that there were no documents referred to in the consideration of the seniority complaint by the complainant. The Committee is made up of equal representation from employers and the union with each side nominating three persons. While it was the evidence of Mr. Morran that he could recall the details of this case, there was no evidence with regard to the recollections of the other five members of the Committee.

6. In the *Corporation of the City of Mississauga*, [1982] OLRB Rep. March 420, the Board considered a complaint which alleged a violation of section 68 where there had been a delay of more than five years between the occurrence of the events complained of and the filing of the complaint. The Board refused to entertain the complaint on its merits. At page 425, the Board stated:

20. It is by now almost a truism that time is of the essence in labour relation matters. It is universally recognized that the speedy resolution of outstanding disputes is of real importance in maintaining an amicable labour-management relationship. In this context, it is difficult to accept that the Legislature ever envisaged that an unfair labour practice, once crystallized, could exist indefinitely in a state of suspended animation and be revived to become a basis for litigation years later. A collective bargaining relationship is an ongoing one, and all of the parties to it — including the employees — are entitled to expect that claims which are not asserted within a reasonable time, or involve matters which have, to all outward appearances, been satisfactorily settled, will not reemerge later. That expectation is a reasonable one from both a common sense and industrial relations perspective. It is precisely this concern which prompts parties to negotiate time limits for the filing of grievances (as the union and the employer in this case have done) and arbitrators to construct a principle analogous to the doctrine of laches to prevent prosecution of untimely claims. (See *Re C.G.E.* 3 L.A.C. 980 (Laskin); and *Re Oil Chemical and Atomic Workers, Local 9-672 and Dow Chemical of Canada Limited* [1966] 18 L.A.C. 51 (Arthurs)).

21. In recognition of the fact that it is dealing with statutory rights, the Board has not, heretofore, adopted any rigid practice with respect to the matter of delay — holding, in most cases, that it will simply take this matter into account in determining the remedy if a statutory violation is established. However, whatever the merits of this approach, the Board must also keep

in mind the potentially corrosive effect which litigation can have upon the parties' current collective bargaining relationship — quite apart from the outcome. Adversarial relationships are pervasive enough in our industrial relations system without the resurrection of ghosts from the past. In the Board's view, the orderly conduct of an ongoing collective bargaining relationship and the necessity of according a respondent a fair hearing both require that unions, employers and employees recognize a principle of repose with respect to claims that have not been asserted in a timely fashion. If such claims are not launched within a reasonable time, the Board may exercise its discretion pursuant to section 89 and decline to entertain them.

7. Similarly, in *Sheller-Globe of Canada Ltd.*, [1982] OLRB Rep. Jan. 113 (affirmed by the Ontario Divisional Court — see (1983) 42 O.R. (2d) 73), the Board was faced with a complaint which alleged a violation of section 68 where there had been a delay of two and a half years between the occurrence of the events which gave rise to the complaint and the filing of the complaint. The Board again refused to entertain the complaint on its merits. In *CCH Canadian Limited*, [1977] OLRB Rep. June 351, the Board stated that as a general rule it would not entertain a complaint under [now section 89] only because of a delay in filing a complaint. The Board also stated in that case that where unreasonable delay had occurred the Board would in most cases take this factor into account in assessing any compensation which might be awarded. In that case there had been a delay of fourteen months, and, the Board concluded that, because of the extreme delay in filing the complaint and the lack of any mitigating factors which might justify or excuse the delay, it should exercise its discretion under [now section 89] and refrain from inquiring into the complaint. In the *Corporation of the City of Mississauga*, *supra*, the Board expressed the view that the limit on delay ought to be measured in months rather than years.

8. In the instant complaint, the delay is measured in years rather than months. The reasons for delay provided by the complainant relate to money, his health and misdirection. With regard to his financial affairs, the evidence is of a very general nature and the Board is not satisfied that he was financially unable to file this complaint promptly. The nature of the complainant's illness and contemplated surgery were not disclosed to the Board and there is nothing before the Board which in any way indicates that he was unable to fix his attention on his complaint in a prompt manner. The misdirections which he received did not prevent him from reassessing his situation and filing this complaint in a prompt manner.

9. In all the circumstances of this complaint, the Board considers it appropriate in the exercise of its discretion under section 89 not to inquire into this complaint. It is far too late. This complaint is therefore dismissed. In these circumstances, it is unnecessary for the Board to consider the second motion.

0017-84-M St. Raphael's Nursing Home (Kitchener), Employer, v. London & District Service Workers Union, Local 220, Trade Union

Arbitration — Reference — Employer making expedited arbitration referral after expiry of time stipulated in collective agreement — Courts in *Royal York Hotel* case requiring strict adherence to time limits — Referral untimely

BEFORE: R. O. MacDowell, Acting Alternate Chairman, and Board Members S. Cooke and J. A. Ronson.

APPEARANCES: *Arthur Schelter for the employer; Randy Levinson for the trade union.*

DECISION OF THE BOARD; June 29, 1984

1. This is a reference under section 107 of the *Labour Relations Act*. The Minister of Labour has referred to the Board a question that relates to his authority to appoint an arbitrator under section 45 of the Act. The material provisions of section 45 read as follows:

45.-(1) Notwithstanding the arbitration provision in a collective agreement or deemed to be included in a collective agreement under section 44, a party to a collective agreement may request the Minister to refer to a single arbitrator, to be appointed by the Minister, any difference between the parties to the collective agreement arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.

(2) Subject to subsection (3), a request under subsection (1) may be made by a party to the collective agreement in writing after the grievance procedure under the agreement has been exhausted or after thirty days have elapsed from the time at which the grievance was first brought to the attention of the other party, whichever first occurs, but no such request shall be made beyond the time, if any, stipulated in or permitted under the agreement for referring the grievance to arbitration.

2. Section 45 was introduced into the Act in 1979. Its purposes were threefold: to expedite the hearing of unresolved grievances, to provide third party assistance to aid in the settlement of those grievances (see section 45(6)), and to reduce the cost of the arbitration process by substituting the statutory alternative of a single arbitrator for the more cumbersome tripartite board envisaged by section 44(2) of the Act and frequently found in the parties' collective agreements.

3. The structure of section 45 is quite straightforward. A party is entitled to apply to the Minister for the appointment of a single arbitrator thirty days after the grievance is filed or following the completion of the grievance procedure, whichever occurs first. On the receipt of such request the Minister must appoint an arbitrator who is able to begin hearing the dispute within twenty-one days of the receipt of the request for arbitration. Grievances involving discharges are dealt with even more expeditiously. The section 45 mechanism is, by statute, available "notwithstanding the arbitration provision in [the parties'] collective agreement".

4. But access to expedited arbitration under section 45 is not unlimited. Section 45(2) creates what might be described metaphorically as a "time window" which opens upon the exhaustion of the grievance procedure or after thirty days have elapsed from the filing of the grievance, whichever first occurs, but closes with the expiry of the time, if any, stipulated under the collective agreement for referring the grievance to arbitration. A section 45 reference must be made within these temporal parameters, or it cannot be made at all. Moreover, in *Re Hotel, Restaurant and Cafeteria Employees Union, Local 75 and Royal York Hotel* (1983), 42 O.R. (2d) 509, the Divisional Court held that these time limits must be strictly construed.

5. The relevant provisions of the collective agreement in this case are as follows:

ARTICLE 7 – GRIEVANCE PROCEDURE

7.01 Definition

For the purposes of this Agreement "Grievance" is defined as a dispute claim or complaint involving the interpretation, application, administration or alleged violation of the Agreement including any question as to whether a matter is arbitrable.

7.02 Step 1

The aggrieved employee shall present his/her grievance in writing on the Union's standard form, completed as indicated on the form, any amendment to the form itself, if of substance, to be approved by the Employer to his/her immediate supervisor. The steward of the aggrieved employee may also be present when the grievance is presented to the immediate supervisor. If a settlement satisfactory to the employee concerned is not reached within three (3) working days of any longer period which may be mutually agreed upon at the time (such extension to be given in writing) the grievance may be presented as follows at any time within three (3) working days thereafter.

Step 2

Failing a satisfactory settlement in Step 1, the aggrieved employee, accompanied by a Union representative may present his/her grievance to the Administrator or in the Administrator's absence his designated representative who shall consider it in their presence. Should no settlement satisfactory to the employee be reached within three (3) working days the next step in the grievance procedure may be taken at any time within three (3) working days thereafter.

Step 3

Failing a satisfactory settlement in Step 2, the aggrieved employee may submit his/her grievance in writing to the Employer for discussion at a special meeting of the Union Committee and the Employer. The decision of the Employer shall be given in writing within five (5) working days following the meeting. Should the Employer fail to render its

decision as required in Step 2 or if the reply of the Employer is not satisfactory to the employee, the grievance may then be referred to arbitration if the request is made in writing within ten (10) days after the grievance has been dealt with at such special meeting. If no written request for arbitration is received within ten (10) working days after the decision under Step 3 is given or within fifteen (15) working days following the meeting under Step 3 of the Grievance Procedure, the grievance shall be deemed to have been settled.

7.03 No grievance shall be considered which has not been carried through the steps of the grievance procedure within the various time limits any of which may be extended by mutual consent in writing of the parties.

7.04 A Saturday, a Sunday, a Paid Holiday within the meaning of this Agreement shall be excluded in computing the time limits within which a step is taken under the Grievance Procedure of this Agreement.

6. The facts in the present case are not in dispute. On or about November 21, 1983, the union filed a grievance alleging that the employer had contravened the job posting procedures set out in the collective agreement. On November 24, 1983, the employer replied, denying that there had been any breach of the agreement. On December 12, 1983, the parties held the so-called step 3 meeting to canvass their positions. No formal employer response was forthcoming, so on December 21, 1983, the union wrote to the employer to reiterate its position, noting that it was still awaiting a formal reply. On January 23, 1984, the employer wrote to the union indicating that it was not prepared to accept the validity of the grievance, and would refer the matter to arbitration under section 45 if the union did not withdraw it within ten days.

7. On February 2, 1984, the trade union submitted the grievance to arbitration pursuant to Article 8.01 of the collective agreement by advising the employer in writing and naming the union's nominee to a board of arbitration. On February 7, 1984, following receipt of the union's submission, the employer drafted a referral to arbitration under section 45. That referral was mailed to the Minister by registered mail on February 8, 1984, and was received on February 10, 1984. It is interesting to note that in the referral itself, the employer acknowledges that the time stipulated under the collective agreement for referring the grievance to arbitration expires on February 6, 1984 — two days before the employer made its referral under section 45. By letter dated February 16, 1984, the union objected to the appointment of a single arbitrator on the ground that the employer's section 45 referral was untimely.

8. Article 7.02 of the parties' agreement marks time in several ways. It is unnecessary to consider its alternative constructions. It suffices to say that on the interpretation most favourable to the employer, step 3 was concluded and the grievance finally dealt with at that stage, by January 23, 1984, when the employer indicated its rejection of the union's position. The employer warned that it would refer the matter to arbitration under section 45 if the grievance were not withdrawn within ten days. That ten-day period, it might be noted, is the one contemplated by Article 7.02 for referring a case to arbitration. Taking into account Article 7.04 dealing with how "days off" are counted, February 6th is the tenth and last day for making a section 45 referral. The employer had not launched its section 45 referral by that time. Accordingly, its subsequent effort to invoke section 45 was untimely. It is unnecessary to consider the union's alternative submission that even if a *timely* request under section 45 had

been made, it would be pre-empted by an earlier resort to arbitration under the terms of the collective agreement.

9. For the foregoing reasons the Board is of the opinion that:

- (a) in light of the Court's decision in *Royal York Hotel, supra*, the time limits in section 45 must be strictly construed; and
- (b) the employer in this case has failed to make a timely reference under section 45 of the Act.

We therefore respectfully advise the Minister of Labour that, in our opinion, he has no authority to accede to the employer's request, and appoint an arbitrator under section 45 of the Act.

0369-84-R Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Applicant, v. **Simpsons Limited**, Respondent, v. Group of Employees, Objectors

Bargaining Unit — Certification — Practice and Procedure — Trade Union — Board practice to describe units in terms of "Municipality of Metropolitan Toronto" without regard to cities and boroughs within Metro — Street address included in description where two employer operations in Metro — Union constitution requiring members buy union made goods — No reason to dismiss certification or direct vote

BEFORE: R. O. MacDowell, Acting Alternate Chairman, and Board Members W. H. Wightman and B. L. Armstrong.

APPEARANCES: *E. G. Posen, Briane Doherty and John Forester for the applicant; T. F. Storie, Geo. Roberts and P. A. Reid for the respondent; Bernard Scalisi, Malcolm Lord and Lorne E. Cox for the objectors.*

DECISION OF THE BOARD; June 8, 1984

I

1. The name of the respondent is amended to read: "Simpsons Limited".
2. This is an application for certification. The applicant seeks to represent certain employees of the respondent employed at its Heavy Goods Distribution Centre at 100 Metropolitan Road in the City of Scarborough.
3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

4. When this matter came on for a hearing before the Board, the parties were able to reach substantial agreement on the description of the unit of employees appropriate for collective bargaining. There was disagreement on two points:

- a) the respondent asserts that drivers and fleet vehicle personnel should not be included in the bargaining unit because they do not share a community of interest with the other warehouse employees; and
- b) the union claims that the geographic portion of the bargaining unit description should refer to "all employees of the respondent in the City of Scarborough" rather than just those working at the Metropolitan Road facility.

The respondent operates two distribution centres in the Municipality of Metropolitan Toronto. One is in Scarborough and is the subject of this application. The other is at 700 Lawrence Avenue in the City of North York.

5. In warehouse operations, drivers are not normally excluded from the bargaining unit. Accordingly, the Board requested the respondent to outline its position with respect to the fleet service personnel (43 drivers, one mechanic and one truck washer), and sketch in those factors which might point to a separate community of interest justifying their exclusion. Having heard the respondent's representations, the Board is satisfied that there is at least an arguable case for their exclusion which warrants further inquiry.

6. On the question of the geographic scope of the unit, the union maintains that the Board should recognize and attempt to accommodate the evolution of municipal designations in the Metropolitan Toronto area. The former Borough of Scarborough is now a City. So is North York. These changes should be reflected in the Board's certificates. The union also argues that if its bargaining rights are fixed to a street address, any change of address could prejudice those rights.

7. The Board has a long-established practice of framing certificates with respect to municipal designations which, in the case of Toronto, refer to the Municipality of Metropolitan Toronto. For labour relations purposes, the Board has not recognized the separate identity of the contiguous boroughs or cities which comprise Metropolitan Toronto. The Board's approach was enunciated in *Perimeter Industries Limited*, [1973] OLRB Rep. March 174 as follows:

As indicated above the Board's consistent practice is to restrict the geographic area of bargaining units to the Municipality in which the employer's operations are carried on. It is acknowledged that there are certain exceptions to this general rule. The most notable exception is that the Board restricts bargaining units to the Metropolitan Toronto area rather than restrict the bargaining units to the constituent boroughs which form the Metropolitan Toronto area. This practice was adopted in recognition of the fact that with the growth of the Toronto and adjoining municipalities expanding companies found it impossible to expand their operations without moving to one of the peripheral municipalities where sufficient land is available to build larger plants. The Board, in order to avoid the resulting confusion which would flow from a multiplicity of applications which would be necessitated by the removal of the company plants from Toronto to

adjacent municipalities where land was available to expand their parents, determined that it would serve the best interests of collective bargaining generally if the geographic area of the bargaining units for the Toronto area was described in terms of Metropolitan Toronto.

This practice has been consistently followed for decades and we are not persuaded that we should depart from it.

8. We recognize, of course, that any geographic limitation raises a potential difficulty if an enterprise moves beyond that boundary. But that would be the case even if we accepted the union's submission to refer to the City of Scarborough. If the Distribution Centre were to move west, to the City of North York, the same problem would arise and, as a practical matter, since there is unlikely to be any substantial change in the work force, there is little likelihood of actual prejudice to the union's position. Thus, having considered the union's submissions, we are not persuaded that we should frame the bargaining unit with reference to the City of Scarborough. Since there are two distribution centres within the Municipality of Metropolitan Toronto, we are further persuaded that it is appropriate to mention the street address of the one in Scarborough.

II

9. In support of its application for certification the trade union filed documentary evidence of membership on behalf of a large number of the respondent's employees. This documentary evidence took the form of membership cards, which include a combination application for membership and attached receipt. These cards are each signed by the subject employee, and the receipts are countersigned by a witness ("the collector") and indicate that a payment of \$1.00 has been made to the union in respect of its membership fees. The \$1.00 payment is in the nature of consideration and confirms the act of signing.

10. The documentary evidence is supported by a properly completed Form 9, Statutory Declaration, attesting to its regularity and sufficiency. There is no allegation of any irregularity in the form of this documentary evidence, nor is there any alleged impropriety in the manner in which it is solicited. Certainly there is nothing to call into question the "voluntariness" of the individual acts of signing, or to suggest that, by doing so, the employees were not indicating their desire to be represented by the applicant trade union. The form and contents of this evidence are consistent with the requirements of section 1(1)(1) of the Act, and, as well, it meets the form and time requirements prescribed pursuant to section 103(2)(j) of the Act. This documentary evidence, standing by itself, demonstrates that the union has a level of "membership support" in excess of that required for certification without recourse to a representation vote *whether or not the fleet service personnel are included in the bargaining unit*. In other words, *whether the fleet service personnel are included or excluded*, more than fifty-five per cent of the employees of the respondent at the time the application was made, were members of the applicant on May 16, 1984, the terminal date fixed for this application and the date which the Board determines under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the Act. The resolution of the dispute concerning the scope of the bargaining unit cannot affect the union's ultimate right to certification for a unit of employees at the respondent's Heavy Goods Distribution Centre.

11. The respondent employer contends that despite this show of membership support, the Board should either refuse to certify the applicant or direct the taking of a representation vote. The respondent argues that certain portions of the union's constitution make it an inappropriate bargaining agent for employees in the retail industry because they might interfere with the employees' ability to carry out their functions and duties to their employer. The provisions with which the respondent is concerned appear in a kind of preamble preceding the terms of the constitution itself. The first portion of that preamble reads:

In our society, the achievement of true democracy is impossible without a free and democratic labour movement. Only by means of organization may workers enjoy equality of bargaining power with organized industry. Only through organization, may workers have the means of protection and advancing their own interests and the democratic aspirations of the people as a whole. The attainment of true industrial and political democracy cannot be realized until the selfish forces of reaction in our society have been overcome. This task can be done only through the leadership and influence of organized labour. For the achievement of industrial and political democracy, and for the promotion of the welfare of workers in industries under our jurisdiction, we dedicate ourselves to the following objectives and principles:

- (a) Organization of the unorganized.
- (b) Obtaining for workers their just share of the products of industry;
- (c) The practice of true democracy within our own organization;
- (d) Resistance and opposition to all undemocratic forces within our society;
- (e) Political action by labour on local and national levels;
- (f) A united labour movement built on a foundation of justice and democracy;
- (g) Resistance by all possible means to those forces who would reintroduce the malignant blight of national prohibition upon our society;
- (h) In conformity with the Constitution of the C.L.C., to encourage all workers, without regard to race, creed, colour, sex, national origin or ancestry, to share equally in the full benefits of union organization in affiliated Locals, and to protect this Union from any and all corrupt influences.

OATHS AND OBLIGATIONS

MEMBER'S OATH (upon initiation):

"I, (give name), hereby pledge my word of honour that I will be true to this Union and its principles as long as I am a member thereof; that I will faithfully comply with all the provisions of the National Constitution and

Bylaws of this Local Union; that I will consider every one of its members as my friend and brother or sister; that I will not reveal any business or proceedings of any meeting of this Union except to those who have a right to such knowledge; that I will comply with the orders, regulations and laws of this Union, and that I will at all times abide by the regulations and decisions of the General Executive Board of the Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers; that should I fail to keep these promises, I shall be punished with expulsion from this Union."

MEMBER'S OBLIGATION (TO BE READ AFTER MEMBER TAKES OATH):

"It is the duty of every member to purchase none but Union-made goods and to patronize Union places of business and entertainment. Special attention shall be paid to the Union Label and to the Union Showcard and Button. It is the inherent duty of every citizen of the nation to use the right of suffrage at the ballot box when physically able to do so. Members who refuse to do so or make no effort to comply with this obligation may be suspended."

(emphasis added)

12. It is the supposed duty to purchase union-made goods which troubles the respondent since it expects its employees to handle and sell merchandise regardless of its origin. The respondent fears that its employees might be reluctant to handle "non-union" goods and finds it offensive that employees might be encouraged not to buy goods which have not been union-made. The respondent is also concerned that there might be some impact on its policy of employee discounts if employees were unwilling to purchase non-union goods or were discouraged from doing so by the possibility of sanctions. In the respondent's submission, the union is not entitled to represent these employees or, alternatively, they should be made fully aware of its consequences and have the opportunity to express themselves in a representation vote.

13. The union argues that there is nothing in the Act giving this Board any general jurisdiction to determine the appropriateness of an applicant union or to refuse to certify because of constitutional provisions of which the Board may not approve (see *CSAO National Inc. v. Oakville Trafalgar Memorial Hospital Association et al.* (1972), 26 D.L.R. (3d) 63 reversing (1971), 23 D.L.R. (3d) 649). Nor is this a matter which the employer can raise as a bar to certification. The selection of a bargaining agent is the right of the employees, and here a substantial majority of them have indicated their desire to be represented by the applicant union. The union further contends that, however sincerely held, the respondent's concerns are without foundation. To the extent that there is an obligation, imposed on union members it has been voluntarily assumed, and it is merely to *purchase* goods which are union-made and patronize establishments which are organized. It does not prevent employees from *selling* or *handling* non-union goods, dealing with non-union suppliers, or working with tools or equipment which have not been union made. The union represents a variety of employees in various industries who are called upon, from time to time, to handle non-union goods. There is no evidence of any difficulties. The respondent's concerns are entirely academic and hypothetical. Indeed, the injunction to "buy union" or "look for the union label" has very little to do with the employer-

employee relationship. To the extent that in the circumstances of this case it may impinge upon an established employee benefit, it is a matter for collective bargaining. To the extent that it adds an additional factor to be considered by an employee in his role as consumer, it is a matter of individual choice. Finally, the fact is that no one has ever been penalized or disciplined by the union, in any way, because of a failure to purchase or prefer union-made goods over non-union-made goods. In practice, it is no more than a reminder of one factor to be considered — not unlike the frequently heard suggestion to “buy Canadian”.

14. The Board has considered the submissions of the parties, and has decided not to accede to the respondent's request. On the basis of the material before us, it appears that however sincere the respondent's concerns may be, they are both unwarranted and insufficient to prompt the Board to dismiss the application or direct the taking of a representation vote. This is not to say that the Board would be sanguine if an employee's job was put in jeopardy because of conduct which, in the union's own submission, has little to do with collective bargaining or its bargaining relationship with an employer such as the respondent. If such were the case, the Board might very well have to take a close look at the competing interests involved in light of both the union's duty of fair representation and the employee protections set out in section 46(2) of the Act. However, at this stage, it is unnecessary to speculate about problems which, in all likelihood, are entirely hypothetical. Certainly, we see no reason to dismiss the application or exercise our discretion to order a representation vote.

15. Having regard to the foregoing, and the parties' partial agreement concerning the bargaining unit description, the Board finds that the applicant union is entitled to interim certification in respect of a bargaining unit described as follows:

“All employees of the respondent at its Heavy Goods Distribution Centre, 100 Metropolitan Road in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, main office personnel located on the mezzanine floor, security staff, students employed during the school vacation period, persons regularly employed for not more than twenty-four hours per week, and *drivers and vehicle fleet personnel*.”

For the purpose of clarity, the Board notes that main office personnel includes employees physically situated on the mezzanine level engaged in administration, central inventory control, customer service, the general office, and the carpet office.

16. A final certificate must await a determination of whether the drivers and vehicle fleet personnel should be included in the bargaining unit. To that end, the Board hereby appoints a Board Officer to inquire into the duties and responsibilities of the drivers and vehicle fleet personnel, as well as their community of interest, if any, with the other employees in the group for whom the union has been certified on an interim basis.

2607-83-JD Teamsters Union, Local 419, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Complainant, v. The Council of Printing Industries on behalf of **Southam Murray Printing**, and The Graphic Communications International Union, Local 500M, Respondents

Jurisdictional Dispute — Practice and Procedure — Job assignment dispute resulting from introduction of new equipment into book binding process — Complainant union acting quickly but proceeding in wrong forum — Resulting delay not causing Board to refuse to entertain complaint — Consideration of economy and efficiency and employer preference causing Board to affirm original assignment

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members J. A. Ronson and W. F. Rutherford.

APPEARANCES: *Paul Smedley, Norm MacIntyre, Lewis Gottheil for the complainant; Janice Baker and A. Arkell for Southam Murray Printing; Brian Iler and Ken Magnus for The Graphic Communications International Union, Local 500M.*

DECISION OF THE BOARD; June 29, 1984

1. The name "Southam-Murray (A Division of Southam Printing Limited)" appearing in the style of cause of this complaint as the name of one of the respondents is amended to read: "The Council of Printing Industries on behalf of Southam Murray Printing". Having regard to the agreement of the parties, the name: "The Graphic Arts International Union, Local 28B" appearing in the style of cause of this complaint as the name of one of the respondents is amended to read "The Graphic Communications International Union, Local 500M". For ease of reference herein, the Board will refer to the complainant as "Local 419", Southam Murray Printing as "the employer" and The Graphic Communications International Union, Local 500M as "Local 500".

2. Local 419 has filed this complaint under section 91 of the *Labour Relations Act* with respect to an assignment of work made by the employer to employees who are members of Local 500. Subsection 1 of section 91 of the Act provides as follows:

91.-(1) The Board may inquire into a complaint that a trade union or council of trade unions, or an officer, official or agent of a trade union or council of trade unions, was or is requiring an employer or an employers' organization to assign particular work to persons in a particular trade union or in a particular trade, craft or class rather than to persons in another trade union or in another trade, craft or class, or that an employer was or is assigning work to persons in a particular trade union rather than to persons in another trade union, and it shall direct what action, if any, the employer, the employers' organization, the trade union or the council of trade unions or any officer, official or agent of any of them or any person shall do or refrain from doing with respect to the assignment of work.

3. The reply filed by Local 500 requested that the Board exercise its discretion under subsection 1 and decline to entertain the complaint. Counsel for Local 500 put forward that

request at the hearing in the form of a preliminary motion that the Board should decline to entertain the complaint because of undue delay and dismiss it without a hearing on the merits. The Board heard the full submissions of the parties on the preliminary motion, reserved its decision and heard the complaint on its merits. It is necessary, therefore, for the Board to rule on the preliminary motion.

4. Prior to the complaint coming on for hearing before the Board as constituted herein, the parties had attended a pre-hearing conference with the Board's alternate chairman and had reached agreement on many facts, some of which bear on the preliminary motion. Further uncontested facts with respect to the chronology of events leading to the filing of this complaint were contained in the submissions of the parties on the preliminary motion.

5. The events giving rise to this complaint began in May 1982 when the employer introduced some new equipment on its bindery line for the publication known as the "TV Guide". The employer employs members of both unions with respect to that part of its operations. Later that month, two separate grievances were filed by members of Local 419. The employer took the position that the issues raised in both grievances were properly the subject of a jurisdictional dispute. Although there were discussions between representatives of Local 419 and the employer with respect to the proper forum for dealing with the dispute, Local 419 decided to pursue the grievances to arbitration.

6. At a meeting of all three parties to this complaint in September 1982, the employer held to its position that the issues were properly the subject matter for a jurisdictional dispute and not arbitration. The parties do not appear to have resolved in which forum the issues should be decided because Local 500 left the meeting with the impression that the Local 419 was to file a jurisdictional dispute complaint and Local 419 left the meeting with the impression that the question of how to proceed was unresolved. One of the grievances was scheduled for hearing at arbitration in July 1983, but the hearing was adjourned because of a problem with respect to proper notice of the hearing. In any event, it was heard at arbitration on November 4th, 1983, at which time the employer challenged successfully the jurisdiction of the arbitrator on the grounds that the subject matter of the grievance was a jurisdictional dispute. The arbitrator issued an interim award on November 24th, 1983 in which he concluded that the grievance was beyond his jurisdiction. The instant complaint was filed with the Board on February 9th, 1984.

7. Counsel for Local 500 contends that Local 419 knew from the outset that the subject matter of the grievance was a work assignment dispute and not the proper subject matter for a grievance and it was obvious to Local 419 that the employer was taking that position. By September 1982 at the latest, it was clear also to Local 419 that the real dispute was with Local 500 over work jurisdiction and therefore was not a matter for arbitration. Not only did Local 419 ignore the jurisdictional nature of the dispute, it did not move to select a sole arbitrator until January 1983. This was followed by a further six months wait until the first hearing date in July of 1983 for the grievance and, when that date had to be abandoned for the reasons referred to above, the matter sat for another four months before getting in front of the arbitrator. During all of this time, members of Local 500 have been performing the work which Local 419 claims should have been assigned to its members. That sequence of events, Local 500 counsel contends, shows a lack of due diligence by Local 419 in prosecuting their grievances. Moreover, the delay from November 24th, 1983 when the arbitrator declined jurisdiction until February 9th, 1984 when this complaint was filed, constitutes undue delay according to Local 500 counsel. That lack of due diligence in pursuing the grievance and the delay in bringing

this complaint has resulted in the dispute being brought before the proper forum some twenty-two months after it first arose. In these circumstances, counsel contends that the Board should decline to entertain the complaint.

8. Counsel for Local 500 referred the Board to three of its prior decisions in support of his proposition: *Sheller-Globe of Canada, Ltd.*, [1982] OLRB Rep. Jan. 113; *The Corporation of the City of Mississauga*, [1982] OLRB Rep. March 420; and *Ontario Hydro*, [1983] OLRB Rep. June 932. The first two decisions deal with complaints of violation of section 68 of the Act and the Board finds them of no assistance in deciding the delay issue in this complaint. The *Ontario Hydro* decision, like this one, dealt with a complaint made under section 91 of the Act which was brought a year after the complainant trade union was in a position to know about the assignment of the work which it was challenging. At paragraph 6 of the decision, the Board commented as follows:

We are of the view that in the interest of stability on construction sites, the Board should not as a matter of policy disturb *assignments which have gone on for a period of time unquestioned*. In this regard, we would note that other tribunals dealing with jurisdictional disputes, such as the Impartial Board for the Settlement of Jurisdictional Disputes and its predecessor, the National Joint Board developed similar procedural rules about the bringing of a jurisdictional claim as quickly as possible and that a failure to do so results in *a refusal by such tribunals to change an assignment*. Clearly, in the present case the complainant I.A.M. was in the position to know that small equipment was being repaired at the Darlington site by the Operating Engineer mechanics, and its delay in bringing this complaint is sufficient for the Board to refuse to exercise its discretion under section 91.

[emphasis added]

While the conclusion in the last sentence of that passage seems to be a reference to the Board's discretion under section 91 of the Act to decline to hear a work assignment complaint, the statement follows immediately the reference to the practice of other construction industry tribunals refusing to "... change an assignment", where the jurisdiction claim is not brought quickly. Therefore, the Board could have been referring to its broad remedial authority which would give it the discretion not to direct any change in the assignment. In any event, having said it was prepared to dispose of the complaint on grounds of delay, the board decided to "... go on to consider the merits of the complaint in view of the evidence before the Board concerning the respective jurisdictional claims of the two competing trade unions [and in view] of the request by the respondent [trade union] that the Board direct Ontario Hydro to assign the work to its members.". The Board herein is in a similar position with respect to evidence and the request of the respondent trade union for the Board to direct the assignment of work to the respondent's members. In addition, the circumstances of this case differ in two other respects which point the Board towards deciding it on its merits.

9. First, the work assignment in the instant case did not go unquestioned for a long period of time. Local 419 moved quickly to file the first grievance, doing so shortly after the changes on the bindery line resulted in the assignment of the work at issue to members of Local 500. While Local 419 chose the wrong forum for dealing with the issue, it did move to protect its interest. Second, the work at issue in the *Ontario Hydro* case was work on a construction site which, being of a finite nature, would make the employment relationship one of limited duration

In the instant case, the work and the employment relationship is of an ongoing nature. The employment relationship between members of both trade unions and the employer is not dependent solely on the work in question and there is no visible end to the work itself. In these circumstances, the Board is of the view that there is greater reason than in the *Ontario Hydro* case for the Board to consider the complaint on its merits. For these reasons, the Board will exercise its discretion under section 91 of the Act to entertain the complaint on its merits.

10. The parties are agreed that the work in dispute involves the following processes:

- (1) the placing of material onto the muscle feeder extension table of the bindery line; and
- (2) the removal of packaged material from the end of the discharge conveyor of the bindery line and the stacking of the material on skids.

The parties were largely agreed on the relevant facts giving rise to the dispute and the findings of fact herein are based on those agreed facts and the additional evidence which the parties adduced during the hearing on the merits of the complaint.

11. The dispute has arisen as a result of a change in the process for binding the publication TV Guide and the assignment of certain functions with respect to the new process to members of Local 500 which Local 419 contends were previously performed by its members and should have been assigned to them on the new process. The old and the new processes involved the delivery of bundles of loose sheets of printed material, called "signatures", which are fed into the binding machine, cut, bound into booklets, packaged and removed from the bindery line onto skids. The change which has taken place can be described in general terms as changing the manner in which the loose printed material is fed into the binding machine and the method by which the bound material is packaged. The manner in which the bundles of signature sheets are brought to the line has not changed. They are delivered on skids by a tow motor operator member of Local 419. The bundles vary in weight from approximately 45 to 75 pounds. The tow motor operator takes a sample of each signature sheet on the skid to the stitcher operator and they verify jointly that the correct one have been delivered.

12. Prior to May 1982, the bundles of signature sheets were removed from the skid on which they had been delivered, placed on tables adjacent to the in-feed end of the bindery process where the ties and plywood frame forming each bundle were removed. This work was performed by a bindery porter, a member of Local 419. At that point, members of Local 500 took over and placed the loose signature sheets into pockets which fed them into the binding process. The signatures are folded and cut in the binding process. The Local 500 members verified that they were feeding the correct sheets into the correct pockets, jogging them to straighten them for feeding and placed them in the pocket. If an error was made, it could be corrected only after the booklets had been bound by either taking them apart and rebinding them, or by reprinting the signatures and reprocessing them. Errors could occur from either using the wrong signature sheet or incorrectly inserting the signature into the pockets. Two journeyman II book binders have been discharged since May 1982 for mistakes in feeding signature sheets into the bindery process.

13. The booklets came out of the bindery process two bundles at a time. Two members of Local 500, one on each side of the line picked up the bundles, checked the booklets for proper stitching and edge trim and placed the bundles in cartons. These cartons held two hundred

booklets. After the members of Local 500 had placed the appropriate number of bundles in a carton, a bindery porter would seal the carton, remove it from the line and place it on a skid. When the skid was full, a tow motor operator, member of Local 419, would remove the skid from the bindery area.

14. Changes were made to the operation in May 1982 in the way the signature sheets were fed into the binding process and in the packaging of the bound TV Guides. Muscle feeders were added to the pocket area of the bindery line, effectively extending the pockets by six feet. The muscle feeders function to feed the individual signature sheets automatically into the binding process. Ninety per cent of the work is processed through the muscle feeders. The remainder is hand fed in the same way as it was done prior to May 1982. In the new process, the bundles of signature sheets are lifted from skids and placed on the muscle feeder extension by a member of Local 500 who verifies that the correct signature sheet is being fed into the correct pocket. The bundles are lifted, either with the assistance of an overhead, mechanical hoist or manually, placed on the muscle feeder extension, where the plywood frame and cord of the bundle is removed after which the muscle feeder takes over and feeds the signature sheets into the pocket. The muscle feeder has eliminated the need to straighten the sheets by jogging. All of this operation is done by members of Local 500.

15. The sheets are folded, cut and bound in the same manner as prior to May 1982. The bound booklets then pass through a shrink wrap machine which wraps bundles of fifty TV Guides in transparent plastic. As the bundles come off the shrink wrap machine, employees turn the bundles and check by looking through the plastic wrap to see whether the booklets are properly stitched and their edges trim. The bundles of finished product are removed from the line and stacked on a skid. If there are any errors in the stitching, the bundles are set aside in bins for reprocessing. The wrapping on the bundle is also checked and if it is faulty, those bundles are set aside for rewrapping.

16. Some of the finished TV Guides are processed without being shrink wrapped. These are either set aside for mailing or are bun wrapped in bundles. The "mailers" are processed and piled on skids by members of Local 500. The bun tying is done by members of Local 419 who remove the tied bundles to skids. All of the other work, that is the operation of the shrink wrap machine, the checking of the shrink wrapped bundles for correct stitching, edge trim and wrapping and the removal of the bundles from the line to the skids is performed by members of Local 500.

17. The TV Guide bindery process prior to May 1982 utilized seven members of Local 500, three at the in-feed end, two removing the bound booklets and placing them in cartons, one operator and one spare. The process utilized four members of Local 419, one as a tow motor operator delivering material to the line and removing the packaged product from the line, two bindery porters placing the bundles of signature sheets onto the tables at the in-feed end of the line and opening the bundles and one bindery porter sealing and removing cartons of finished products from the end of the line and placing them on skids.

18. The new process employs five members of Local 500 and one member of Local 419. The five members of Local 500 consist of the operator, the spare, two members at the in-feed end of the line placing and opening bundles of signature sheets onto the muscle feeders and one member at the discharge end of the line inspecting the shrink wrapped packages of finished products and removing them to skids. The one member of Local 419 used in the new process

is the tow motor operator who continues to deliver material to the bindery line and remove the skids of finished product from it.

19. There are three other operations in the employer's shop which utilize shrink wrap machines: the express printing department; the Canadian Tire catalogue line and the Canadian Living line. The express printing department operates almost every day. Members of Local 500 take off the finished product on that line as well as the Canadian Living line. On the Canadian Tire catalogue line, the catalogues pass from the bindery operation along a mailing line where mailers perform further functions before the catalogues are shrink wrapped. Members of Local 419 remove the packages from the line.

20. The employer is bound to a collective agreement with each union. Clause 2.1 of Local 419's agreement recognizes it as the exclusive bargaining agent for all employees of the company, with certain exceptions not here relevant, and excepting as well employees presently covered under subsisting collective agreements with other unions. It is common ground that employees covered by Local 500's agreement would be excepted from Local 419's agreement by that provision. Clause 11.1 of the agreement contains a schedule of classifications and wages which includes the classification "plant porter". The schedule provides that the plant porter "[W]hen required, performs a material handling function within the building such as: Bindery porter . . .". Local 500's collective agreement recognizes it "... as the sole collective bargaining agency for all employees working under the Jurisdiction of this Agreement.". Clause 2.01 of Article 2 — Jurisdiction provides that

"The jurisdiction of the Union shall include: . . . feeding and take off, as specified on certain machinery in Article 14, . . .".

Clause 2.02, in turn, states that "'Feeding and Take-Off', as applied within Article 2.01, 'Jurisdiction', of this Agreement, shall henceforth be performed by employees recognized as coming within the scope of this Agreement, . . .". The Board assumes that the machine which folds, cuts and stitches (binds) the TV Guide is specified in Article 14 since the parties do not dispute that feeding and take-off is work properly to be performed by Local 500's members. Rather the dispute was where that work began and ended. The parties for whatever reasons, did not address themselves to whether the shrink wrap machine was included in Article 14 and it is unclear on the face of the agreement whether it is covered.

21. The Board has employed a variety of criteria when deciding how to exercise its discretion under section 91 of the Act to direct what the parties to a work assignment dispute shall or shall not do with the respect to the assignment of work. Criteria commonly employed by the Board with respect to such disputes in the construction industry are collective bargaining relationships, skill and training, economic considerations (or in other words, economy and efficiency), employer practice and area practice. See *Anchor Shoring Limited*, [1974] OLRB Rep. Aug. 528. The Board also commonly considers safety and employer preference to be relevant factors, and in its decision in *Toronto Star Newspapers Limited*, [1980] OLRB Rep. April 565, it considered the nature of the work and job loss. Job loss was a criterion also in the Board's decision in *The Kingston Whig-Standard Company Limited*, [1972] OLRB Rep. Nov. 959 and *The Ottawa Citizen, A Division of Southam Press Limited*, [1973] OLRB Rep. July 403. None of the parties herein raised any issue of safety and there is no evidence of an area practice. Therefore, those criteria which the Board considers to be relevant to the work in dispute herein are nature of the work, collective bargaining relationships, skill and training, economy and efficiency, employer practice, employer preference and job loss.

Nature of the Work

22. It comes as no surprise that Local 419 characterizes as material handling the task of lifting bundles of signature sheets onto the muscle feeders and removing the cord and plywood panels from the bundles at the in-feed end of the line and, at the discharge end, removing the shrink-wrapped packages from the line. It is no less surprising that Local 500 characterizes the same work as feeding and take-off. Their characterizations parrot the language employed in their respective collective agreements.

23. If the work assignments accepted by the parties prior to May 1982 were made on the basis of what the parties were prepared to accept as being materials handling and feeding and take-off, then at the in-feed end of the process the removal of the bundles of signature sheets from skids onto the tables adjacent to the pockets and the opening of the bundles was materials handling by members of Local 419. The preparation and placing of the individual sheets into the pockets, including verifying that the correct sheet was being placed into the correct pocket, was feeding. In those terms, the division between the materials handling and feeding tasks occurred at the tables. Since May 1982, the bundles are removed from the skids and placed directly on the muscle feeder extension and opened there instead of on the tables. If it was accepted by the parties before as materials handling work, as far as describing the work is concerned, it is still materials handling work, whether or not it is being done by members of Local 500. Therefore, to the extent that the task of removing the bundles from the skid, placing and opening them can be described as materials handling, the nature of the work at the in-feed end of the process favours Local 419.

24. Similarly, at the discharge end of the bindery line, the accepted division of tasks prior to May 1982 was for members of Local 500 to take the TV Guide off the line in bundles of 25 and placed them in cartons of 200 booklets. Members of Local 419 closed and sealed the filled cartons and removed them to a skid. The final inspection of the booklets was done as the packages were picked up by Local 500 members. Since May 1982, the final inspection is done after the booklets have been shrink wrapped, their final packaging, after which they are removed to a skid. If the removal of the sealed cartons can be described as materials handling, the nature of the work with respect to removing sealed packages of finally inspected booklets from the end of the process favours Local 419.

25. The work at either end, however, actually combines something of both functions. The consequences of trying to segregate the functions so materials handling could be done by members of Local 419 and feeding and take off by members of Local 500 is discussed in some of the other factors. Therefore, the weight to be given to this criteria in the final analysis will depend on the evaluation of the other related criteria.

Collective Bargaining Relationships

26. While the scope of bargaining rights in both collective agreements is sufficient to incorporate the work in issue, this factor favours neither union. Even if the work is properly described as materials handling, in the Board's view, Local 419's agreement falls short of asserting a claim of exclusive jurisdiction over material handling. The wording in the wage and classification schedule with respect to the plant porter classification on which Local 419 relies starts with the qualification "when required" which makes the statement equivocal at least. On the other hand, the provisions in clauses 2.01 and 2.02 of Local 500's agreement would favour it only if the work in issue is "feeding and take off" work with respect to the binder.

Skill and Training

27. No special skill or training is needed to do the lifting and carrying involved in placing the bundles of signature sheets on the muscle feeder extension and removing their bindings and in taking off the shrink-wrapped bundles of TV Guide booklets at the discharge end of the process. With respect to these aspects of the two tasks, this factor favours neither union. The training and experience gained by Local 500 members who are presently performing the tasks equips them to verify that the correct signatures are being fed into the binder and to do the final inspection of the binding and edge trim of the TV Guide booklets. That training and experience would favour Local 500 should the verification and final inspection need to be an integral part of the tasks of removing the bundles of signature sheets from skids, placing them on the muscle feeder extension and opening the bundles and of removing the packaged TV Guides from the end of the discharge conveyor and stacking them on skids.

Economy and Efficiency

28. The evidence is that 90 per cent of the material fed into the pockets of the bindery is fed automatically by muscle feeders. That is the work which Local 419 is claiming. The remaining 10 per cent is fed manually by members of Local 500. It is not being claimed by Local 419 and is clearly part of the work described as coming under clause 2.01 and 2.02 of Local 500's agreement. If Local 500 members had to remain available for this work while the feeding of the other 90 per cent of the material was assigned to Local 419 members, the inefficiency of that split is obvious. Furthermore, if Local 500 members are retained on the line to do the manual feeding, it makes sense that they continue to verify that the correct material is being fed into the process via the muscle feeders. While that is a relatively simple task in terms of skills and could be acquired by members of Local 419, it is already part of the stock-in-trade of Local 500 members by virtue of the training and experience they acquire during a required two year apprenticeship. Since the muscle feeders have eliminated the manual preparation and feeding of the material, the Local 500 members would have idle time while waiting for the next bundle to be brought by a Local 419 member. On the other hand, since the bundles of material are coded, the present assignment allows the Local 500 members to select the bundle needed from the skid, bring it to the muscle feeder extension table and open it, at which point the muscle feeder takes over. Thus the integrated task is performed by one person, a person who must be available anyway when manual feeding is done.

29. At the discharge end of the line where the manpower has been reduced from three employees to one, if that manning is to be maintained, either a member of Local 419 has to assume the final inspection function or else the Local 500 member who does the final inspection also removes the packages from the line and stacks them on a skid. As already stated, inspection of the final product, albeit a relatively simple one, is part of the acquired skills for the Local 500 members. Even so, two members of Local 500 have been discharged since May 1982 for mistakes in final inspection. Local 419 members would require some training to do that task. No special training is needed, on the other hand, for the Local 500 member to complete the take off of the shrink wrapped packages after final inspection. On that basis, it is more efficient to have the final inspection and take off done by a member of Local 500.

30. This factor favours Local 500.

Employer Practice

31. The fact that Local 500 members remove the packaged, finished product from the Canadian Living bindery line and the express printing line and Local 419's members perform that task on the Canadian Tire catalogue is conclusive only of the fact that, for whatever reasons, the task of removing finished product has not been consistently assigned to either of the two trade unions. This factor favours slightly Local 500.

Employer Preference

32. The employer's preference is for Local 500 members to perform the disputed work at both ends of the process as is evident by the present assignment. The basis for its preference is two-fold: the use of members of Local 500 allow the realization of the manpower savings made possible by the introduction of the muscle feeder extension table and the shrink wrap machine and it retains and utilizes their existing skill and experience in product inspection. Assignment to Local 419 of the work at the in-feed end of the process would result in an additional employee not required with the present assignment unless the employer also assigns the manual feeding work to Local 419 even though it does not claim that work. While the identical consideration does not apply at the take-off end, the employer in assigning the consolidated tasks has had to choose between transferring the final inspection task from Local 500 members to Local 419 members if they are going to continue to remove the packaged booklets from the line, or transferring the physical task from Local 419 members to Local 500 if they are going to continue to do the final inspection work. The employer has made the choice to leave the final inspection with the employees who are trained and experienced in that task. Changing the assignment would require the employer either to forego the benefit of having final inspection done by employees already trained and experienced in the work or to retain an extra employee if it was not prepared to have final inspection done by Local 419 members.

Job Loss

33. Counsel for Local 419 argued that this factor favoured it because three of its four members who had worked on the bindery process prior to May 1982 had lost their jobs whereas only two of seven of Local 500's members had lost their jobs. Those are not the equities considered by the Board for this criteria as it was applied in the three cases referred to above. In the *Whig Standard* and *Ottawa Citizen* decisions, the Board was dealing with situations where the assignment in one direction would allow one craft to gain employees at the expense of the other losing them. Whereas the opposite assignment would avoid job loss by either craft. In the *Toronto Star* decision, the way the Board applied this criterion was influenced by a prior voluntary agreement between the parties, a factor not present here. In the instant cases, both unions have suffered job loss as a result of the change. Therefore, this criteria favours neither union.

34. The criteria which are the most conclusive of these issues herein, in the Board's view, are economy and efficiency and employer preference. The remaining criteria either do not favour one union or the other, only slightly favour them or else are so inter-related with the criterion of economy of efficiency they do not assist in overcoming its significance. The criteria economy and efficiency and employer's preference clearly favour Local 500. Therefore, the Board affirms the original assignment.

35. In the result of the foregoing, the Board directs the employer Southam Murray Printing to continue to assign to members of The Graphic Communications Local 500M

- (1) the placing of material onto the muscle feeder extension table of the bindery line; and
 - (2) the removal of packaged material from the end of the discharge conveyor of the bindery line and the stacking of the material on skids.
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1973-83-R International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.), Applicant, v. **Sternson Limited**, Respondent, v. Group of Employees, Objectors

Employee — Whether executive secretary to Company Vice-President employed in confidential capacity — Whether several individuals holding managerial titles exercising managerial functions

BEFORE: G. Gail Brent, Vice-Chairman and Board Members W. H. Wightman and B. L. Armstrong.

APPEARANCES: *Clare Meneghini for the applicant; Robert E. Salisbury and T. Bright for the respondent; no one appeared for the group of employees.*

DECISION OF G. GAIL BRENT, VICE-CHAIRMAN AND BOARD MEMBER B. L. ARMSTRONG; June 6, 1984

1. The parties agreed on a bargaining unit; however, in its decision dated January 9, 1984 the Board expressed its concern at the use of the phrase "executive secretary" (secretaries) and indicated that the exclusion was agreed to on the understanding that at least one such secretary, the executive secretary to the President, was employed in a confidential capacity in matters relating to labour relations within section 1(3)(b) of the Act. It was suggested by that panel that the bargaining unit might be better described by referring to the positions with more particularity. The parties have agreed on certain descriptions to be used and the description of the bargaining unit will be so amended should the positions be excluded.

2. The respondent is challenging the inclusion of Ildiko Farkas, the executive secretary to the Vice-President of Research and Development, and Rosalyn Wensveen, the executive secretary to the Vice-President of Manufacturing. The applicant has challenged the inclusion of eleven people classified as product managers, traffic manager, credit manager, data processing manager, purchasing agent, and manager laboratory and quality assurance. The parties agreed that Douglas Tosh was an employee included in the bargaining unit.

3. Executive Secretary to the Vice-President of Research and Development

There was some disagreement in the evidence; however, it is clear that Ms. Farkas does secretarial work for several people in the lab in addition to Mr. Mailvaganam, the Vice-President of Research and Development. Mr. Mailvaganam is in charge of the laboratory and in the course of his duties he hires, fires, lays off, makes decisions regarding salaries, prepares the budget proposal for his department, etc. In the course of her work Ms. Farkas types hiring letters which contain salary offers, she oversees the filling out of the lab attendance book, types budgets which contain proposed salaries for employees as well as their current salaries. The salary information in the budget is confidential and the figures which she sees have not been finalized and may not represent the increase which is eventually given to the employees. The budget proposals are intended solely for management discussions. She also typed the only confidential disciplinary letters which Mr. Mailvaganam has had occasion to write to employees under his jurisdiction, and has access to confidential personnel files kept in his office to the extent that she can remove them from his office in his absence if they are needed by management personnel. She also types employee performance appraisals.

4. In the Board's opinion Ms. Farkas is employed in a confidential capacity in matters relating to labour relations. She is involved as a regular part of her work for Mr. Mailvaganam with confidential salary proposals, and has access to and prepares documents which become a part of confidential personnel files. Although her work extends beyond labour relations, that is a necessary function of her supervisor being involved in both technical and personnel matters which relate to the laboratory as a whole. Under the circumstances, and keeping in mind the decision in *RCA Ltd.* [1980] OLRB Rep. Sept. 1316, we consider that she should be excluded.

5. Executive Secretary to the Vice-President of Manufacturing

Ms. Wensveen also performs secretarial duties for a number of people including the plant manager. In the course of her duties she types the overall budget for the plant which includes proposed salaries as well as current individual salaries. The budget she types is prepared as a confidential management document for discussion purposes and it does not indicate that the individual will necessarily receive the salary proposed. She is the only person who does secretarial work for the plant manager and he and the Vice-President of Manufacturing are the management people who negotiate with the plant bargaining unit. There is evidence that she typed some of the respondent's bargaining proposals for the plant negotiations and that she typed the paper work in the only formal disciplinary action which the respondent has taken since 1980.

6. It is the view of the Board that Ms. Wensveen should be excluded from the bargaining unit for the same reasons that Ms. Farkas was excluded.

7. In view of these findings we hereby determine that the bargaining unit should be described as follows:

All office, clerical and technical employees of the respondent in the City of Brantford save and except supervisors, those above the rank of supervisor, the executive secretary to the president, the executive secretary to the vice-president of research and development, the executive secretary to the vice-president of manufacturing, salesmen, comptroller, persons regularly employed for not more than 24 hours per week, students employed during

the school vacation period and employees covered by subsisting collective agreements.

8. Product Managers

These people do not have any supervisory responsibility nor are they involved in confidential labour relations matters. In *Inglis Ltd.*, [1976] OLRB Rep. June 270 the Board did a thorough analysis of the criteria which should determine whether or not people were managerial for the purposes of section 1(3)(b). Basically, the section excludes those who can affect the terms and conditions of employment or the employment relationship of others and also those who make decisions regarding the policy and overall operation of the organization. In relation to the latter, the Board considered that decisions to implement a course of action or effective, active participation in decisions are managerial functions.

9. The product managers are involved in marketing their own product lines. While the job unavoidably involves technical expertise and acting as a technical resource person, that is a function which occurs once the marketing plan has been determined. If the sole function of the product manager was in customer liaison and technical advice, then we would agree that the situation closely paralleled the one analysed in *RCA Limited* [1980] OLRB Rep. 1316. Similarly, we agree that the fact of technical or specialized competence does not of itself indicate a managerial position (see, for example, *Spar Aerospace Products Ltd.* [1979] OLRB Rep. July 700).

10. The product manager has no staff reporting to him and he is not engaged in any supervisory activity or any activity which would directly affect the employment relationship of any employee. Therefore, if that position is to be regarded as managerial within the meaning of section 1(3)(b), it must be because the product manager makes decisions regarding policy and overall operation of the organization. To assess that we must consider the role of the new product development committee and the product manager's role on that committee. As far as we can ascertain the product committee is chaired by the respondent's executive vice-president and its other members are all of the product managers, a representative from the laboratory, the vice-president manufacturing, and Ms. Debbie Hunter, a member of the clerical staff in the marketing department. Ms. Hunter is there to take minutes and to provide information; she does not participate in the committee's decision-making. According to the evidence everyone on the committee has a vote and decisions are made on the basis of majority votes. The product manager may determine that a new product should be developed by the respondent and he may then initiate discussions with the laboratory concerning the possible development of the product. It is the product manager's basic responsibility to develop new products from the initial idea to the finished product. In order to market a product the product manager must get the approval of the new product committee of which he is a member and on which he has an equal vote with everyone else. He is therefore directly involved in making effective decisions as to whether the respondent will produce and market any product. The same group also makes decisions about dropping products.

11. If a new product were to be instituted the product manager would be an effective part of that decision and would have knowledge of it before anyone in the plant. Similarly, if a product were to be dropped, he would also be an effective part of that decision and would have knowledge of it before anyone in the plant. Decisions about whether to continue to manufacture products or whether to manufacture new products are the sort of decisions which have an undoubted effect on the employment of others. To that extent the position is significant-

ly different than those professional and technical employees whose positions were dealt with in *Inglis Ltd.*, *supra*, and *Spar Aerospace Products Ltd.*, *supra*. We therefore conclude that this sort of decision-making is managerial within the meaning of section 1(3)(b) and the product managers should be excluded from the bargaining unit.

12. Traffic Manager

The traffic manager position is occupied by Mr. Bruce Jacques. It was his evidence that he spends about 60% of his time dealing with outgoing traffic and 40% of his time handling cash sales for customers coming in off the street. He does not have anyone reporting to him and he has no supervisory authority over anyone in the shipping department. He has no part in management meetings other than to provide information on freight rates.

13. His duties as traffic manager involve arranging with carriers for transportation of the respondent's products from its factory to its customers. He decides which carrier to call based on the best rates available for the carrier which operates in the area where he must ship. There is no doubt that Mr. Jacques exercises some discretion and authority in his work and that he has a great deal of knowledge and experience in his field; however, based on the test set out in *Inglis Ltd.*, *supra*, we cannot conclude that his position is one which should be excluded from collective bargaining by virtue of section 1(3)(b).

14. Credit Manager

This position is occupied by Mr. Henry Killingbeck. Mr. Killingbeck has no employees reporting to him and he reports to the respondent's controller. Some of Mr. Killingbeck's duties involve (approximately 30 or 40% of his time) assisting the comptroller with accounting duties. As credit manager, he deals with credit checks on customers and makes normal day-to-day decisions on whether to grant credit to customers as well as contacting customers to collect accounts. In case of any doubt he consults with the comptroller. He testified that he believes that he has the authority to accept less in settlement of an account but that he always consults with the comptroller before doing so. He does not prepare a budget for his operation.

15. In the course of assisting the comptroller he has access to the respondent's financial records but he does not see budget projections or any proposals prepared for collective bargaining. The sort of financial statements which he prepares or sees are those which show the respondent's past performance. He makes no recommendations regarding the way in which the respondent should allocate its resources.

16. Given all of the evidence before us we cannot conclude that Mr. Killingbeck performs the sort of managerial function which should exclude him from collective bargaining pursuant to section 1(3)(b) of the Act. Therefore, we conclude that Mr. Killingbeck is included in the bargaining unit.

17. Data Processing Manager

Mr. Brian Rushton is the data processing manager. As such he is responsible for the operation of the respondent's computer and is the only person who has a user identification code which enables him to have access to all of the respondent's data stored on the computer, the respondent's financial data, product formulae, costing information, etc. Mr. Rushton does

not prepare any information for collective bargaining nor does he take part in negotiation for a collective agreement.

18. During the course of his employment he has had employees working under him whose work he has directed. He was involved in interviewing and assessing potential data processing employees and in the decision to hire, fire and lay off those data processing employees. He made assessments of employee performance which resulted in wage increases. He keeps confidential information regarding formulae and costs locked in his office and has been instructed to shred the information if it is to be discarded.

19. There is now no employee reporting to him, the last having been laid off in January, 1983 for economic reasons. That employee was hired after having been interviewed by Mr. Rushton. The applicants for the job replied to an advertisement which gave Mr. Rushton's name as the person to whom replies should be addressed. Mr. Rushton chose the successful candidate who was then given a second interview with Mr. Rushton and the comptroller. Mr. Rushton then took part in the discussion with the comptroller regarding the decision to hire. Mr. Rushton recommended a starting salary for the employee and the recommendation was adopted. As mentioned earlier, he also assessed the employee for the purpose of a salary increase. When the employee was to be laid off, Mr. Rushton was advised first by the comptroller.

20. Because of his technical expertise and position, part of Mr. Rushton's responsibilities is to make effective recommendations to the respondent regarding hiring, firing, progress, and salary of any employees in data processing. There can be no doubt that the final determination regarding whether to employ or to continue to employ someone in data processing is taken by someone else; however, Mr. Rushton appears to be relied on to effectively determine who will be hired, whether employment should continue and how much to pay the employee. These responsibilities would put him in a clear conflict of interest situation should he be included in the same bargaining unit as that employee. We therefore conclude that Mr. Rushton should be excluded from the bargaining unit pursuant to section 1(3)(b).

21. Purchasing Agent

Mr. Jack Comerford is the respondent's purchasing agent. He is responsible for ensuring that sufficient supplies of raw material are on hand to meet the respondent's production schedule. He is supplied with information regarding what supplies are required to be purchased to allow production to proceed as scheduled. The raw materials to be purchased are specified to the extent that the particular supplier is also designated. Mr. Comerford plays no part in deciding which supplier will be chosen. The laboratory designates the type of product need and the source of it. His area of discretion and decision — making is limited. He has no employees working under him.

22. Given all of the evidence regarding Mr. Comerford's duties and responsibilities we cannot conclude that his position is managerial when measured against the criteria set out in *Inglis Ltd., supra*. There appears to be no reason why Mr. Comerford should be excluded from collective bargaining. We therefore conclude that he should be included in the bargaining unit.

23. Manager Laboratory/Manager Quality Assurance

As of the date of the application this position was held by Mr. Fraser Kerr. It would appear from the evidence that Mr. Kerr's primary responsibility is as quality assurance or

quality control manager. In this capacity he has one employee working under him. In relation to the day-to-day quality control of the respondent's product both Mr. Kerr and the employee, a quality control technologist, appear to do virtually the same work involving testing and the power to stop production. Mr. Kerr is responsible for writing the quality control procedures and ensuring that the technologist is aware of them and carries them out correctly. Those procedures are used in all of the respondent's manufacturing operations.

24. Mr. Kerr testified that he would now be responsible for hiring anyone to work in quality control. He also testified that he has fired employees in the past. He grants time off in lieu of overtime to his technologist and co-ordinates vacation time in quality control. He assesses the performance of the technologist. He testified that he has input regarding wage increases to staff reporting to him. In the course of his duties he travels to the respondent's other plants to review quality and make recommendations regarding production.

25. Although there is some difficulty assessing the evidence because of the change which has occurred in Mr. Kerr's duties, we cannot ignore his assertions that he always had and still has the power to hire and fire employees working under his control and direction. Further, he appears to be involved in evaluating employees for the purpose of wage increases. Given his evidence regarding his continuity and current authority to hire and fire, we consider that he should not be included in the bargaining unit.

26. Conclusion

In view of our definition of the bargaining unit excluding the three executive secretaries, and our decision to exclude the six product managers, Mr. Rushton and Mr. Kerr as well as the agreement of the parties that Mr. Tosh is to be included in the bargaining unit, we find that there were twenty-four employees in the bargaining unit at the relevant date. The applicant has filed proof of membership for thirteen of those employees. Since that represents less than fifty-five per cent of the bargaining unit the Board hereby orders, pursuant to section 7(2) of the Act, that a representation vote be held to determine the wishes of the majority of the employees.

27. There was a petition filed at the time of the original hearing and representatives of the petitioners did appear then and were a party to the agreement to refer the matter to a Board Officer to inquire into the duties of the people we have dealt with in this decision. The petitioners were served with notice of this proceeding but did not appear. In any event the petition would be irrelevant, even if voluntary, because the applicant is not in a position to be certified without a representation vote.

28. A representation vote will be taken of the employees of the respondent in the bargaining unit. All employees of the respondent in the bargaining unit on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

29. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.

30. The matter is referred to the Registrar.

DECISION OF BOARD MEMBER W.H. WIGHTMAN;

1. I would have acceded to a bargaining unit description as suggested by the respondent company.

2. It will be recalled that when professional nurses began organizing, Head Nurses and other levels up to the level of Director of Nursing Services were included in bargaining units on the basis that they had titles but no real authority over their colleagues. This came about probably because of a propensity for Directors of Nursing Services in many hospitals to take responsibility for the indicia by which the Board judges managerial or supervisory authority out of the hands of Head Nurses and other levels of nursing supervision.

3. This case represents the reverse side of that coin. It is a low-profile organization of a type which may become increasingly common in industry with the evolution of new technology and which was probably not contemplated when the legislation was being developed.

4. As an example, although Fraser Kerr carries the title of manager, any "authority" he has over his colleague in quality control is more self-assumed than real. Of the two people working in quality control he may be the more experienced and senior in terms of length of service but it is some considerable time since he has exercised the authority or even effectively recommended on matters such as hiring or firing. Since the company expanded its activities in Canada and adjusted its organizational structure any authority Mr. Kerr has over his co-worker is imagined not real.

2516-83-R The International Brotherhood of Painters and Allied Trades Local 1824, Applicant, v. **Waterloo Glass & Mirror Ltd.**, Respondent, v. Group of Employees, Objectors

Adjournment — Bargaining Unit — Practice and Procedure — Union receiving timely notice of hearing but not becoming aware of hearing date through own fault — Individual having notice of schedule requiring attendance before two Board panels on same day must contact Board registrar or make other arrangement — No adjournment on either ground — Whether glaziers' apprentice performing some office work lacking community of interest — Familial relationship with management alone not causing exclusion of employee from unit

BEFORE: Ian C. Springate, Vice-Chairman, and Board Members J. A. Ronson and W. F. Rutherford.

APPEARANCES: *S. Simpson and George McMenemy for the applicant; Jim Finlayson for the respondent; no one appearing for the group of employees.*

DECISION OF THE BOARD; June 8, 1984

1. This is an application filed pursuant to the construction industry provisions of the *Labour Relations Act*.

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3. On February 14, 1984 the Board appointed a Labour Relations Officer to inquire into, and report back to the Board, on the list and composition of the bargaining unit. At a meeting convened by the Labour Relations Officer the parties indicated that with one exception they were in agreement as to the proper list of bargaining unit employees. The exception related to Mr. Geoffrey Oprel. The respondent contended that Mr. Oprel was an employee in the bargaining unit whereas the applicant contended that he should be excluded from the unit "on the grounds of community of interest". The officer then conducted an inquiry into Mr. Oprel's duties and responsibilities. On March 19, 1984 the officer issued a twelve page report containing a verbatim transcript of the evidence led at his inquiry. On May 7, 1984 the Registrar of the Board advised the parties that a hearing would be held on May 18, 1984 so that the Board could hear their representations with respect to the report.

4. At the commencement of the hearing on Friday, May 18, 1984, counsel who had just been retained by the applicant, requested an adjournment of the proceedings. The request was based upon two grounds. One was that although notice of the hearing had been received at the applicant's offices on or about Wednesday, May 9, 1984, Mr. McMenemy, the applicant's new business agent, had not become aware of the hearing until Wednesday, May 16, 1984. Applicant's counsel submitted that because Mr. McMenemy had only two days notice of the hearing, he was not in a position to make representations with respect to the officer's report. The second ground for the requested adjournment was based upon a submission that Mr. McMenemy was required to attend on the same day before another panel of the Board with respect to a separate matter. The respondent opposed any adjournment of the proceedings, both to avoid prolonging the proceedings as well as due to the extra costs that an adjournment would entail.

5. The Board has a longstanding policy of not granting adjournments except on consent of the parties, or where there are circumstances beyond the control of the party requesting the adjournment, and to proceed would seriously prejudice such party. See: *Nick Masney Hotels Ltd.* [1968] OLRB Rep. (Nov.) 833 and (Dec.) 965; (1970), 7 D.L.R. (3d) 119 (Ont. H.C.); (1970), 13 D.L.R. (3d) 289 (Ont. C.A.). In line with this policy, at the hearing the Board orally rejected the request for the adjournment. Late receipt by a party of a notice of hearing may be appropriate grounds for an adjournment. Here, however, the applicant received notice of the hearing in plenty of time for it to take reasonable steps to ensure that it would be properly represented. In our view, any difficulties faced by Mr. McMenemy as a result of the applicant's own internal procedures were not a proper basis for an adjournment. Before leaving this point, we would note that since the report of the Board Officer is only twelve pages long, the time required to prepare for the Board hearing would not likely have been very great.

6. As for the claim that Mr. McMenemy was required to attend before another panel of the Board, that situation could have been appropriately handled in either of two different ways. Prior to the hearing date the applicant could have contacted the Board's Registrar, either directly or through one of the Board's staff, to see if it might be possible to "stagger" the two hearings such that one hearing would not begin until the other one had finished. Where it is reasonable to do so, the Board seeks to accommodate such requests, particularly if one of the hearings is likely to be fairly brief. In the instant case, a request that the cases be staggered would likely have been agreed to. Indeed, it appears that on May 18, 1984 the other proceeding that Mr. McMenemy was involved with was delayed so that he could attend before this panel. If it had been the case that the two hearings could not have been staggered, or if they could

have been staggered but Mr. McMenemy desired not to be involved in two hearings on the same day, then the applicant should have arranged for someone other than Mr. McMenemy to attend in these proceedings. Indeed, there was no particular reason why Mr. McMenemy had to be the one to address the Board with respect to the matters contained in the officer's report. In this regard it is noteworthy that Mr. McMenemy had not been the applicant's representative at the inquiry conducted by the Labour Relations Officer.

7. After the Board announced that it would not grant an adjournment, the applicant's solicitor and Mr. McMenemy both withdrew from the hearing room. Accordingly, the Board heard representations only from the respondent relating to the officer's report.

8. The applicant is applying for a bargaining unit of glaziers and glaziers' apprentices. The officer's report indicates that Geoffrey Oprel has worked for the respondent as a glaziers' apprentice since 1978. Mr. Oprel has been employed primarily in the respondent's shop, (indeed he spent all of his time on the application date in the shop) although he has also spent a considerable amount of time working in the respondent's office. In addition, Mr. Oprel spends approximately ten per cent of his total time on job sites. The applicant challenged the inclusion of Mr. Oprel's name on the list of employees on the basis of a lack of community of interest with other employees. Given the questions posed to Mr. Oprel by the applicant's representative at the Labour Relations Officer's inquiry, we gather that the applicant contends that Mr. Oprel lacks a community of interest with other employees because of the time he spent working in the respondent's office, as well as the fact that he is the son of Mr. Peter Oprel, the respondent's president. At no point in the proceedings did the applicant contend that since Geoffrey Oprel spent all of the application date in the respondent's shop, on that date he was not an employee in the construction industry. We gather, instead, that the applicant views this as a case where it is appropriate to regard shop employees as construction industry employees in accordance with the provisions of section 117(b) of the Act, which states as follows:

“‘employee’ (for the purposes of the construction industry provisions of the Act) includes an employee engaged in whole or in part in off-site work but who is commonly associated in his work or bargaining with on-site employees.”

9. We turn now to consider the community of interest issue insofar as it relates to Geoffrey Oprel's involvement with the respondent's office operations. When Mr. Oprel commenced full-time employment with the respondent in 1978 he was not involved in any office work. Commencing in or about 1981 this was changed so that he spent about thirty per cent of his time in the office. This was raised to about forty per cent of his time in 1982. For most of 1983 Mr. Oprel worked almost exclusively in the shop, but due to certain staff changes early in December of 1983 he began to spend about half of his time in the office. This lasted until either January 25th or 26th of 1984, when Mr. Oprel ceased to work in the office and began to spend almost all of his time in the shop. This was the situation as it existed on February 2, 1984, the date the applicant applied to be certified. Accordingly, as of the application date, Mr. Oprel was not distinguished from the other employees on account of his performing office work. In these circumstances, we do not view this as an appropriate basis for excluding him from the bargaining unit.

10. Mr. Geoffrey Oprel is the son of the respondent's president. The officer's report, however, indicates that Geoffrey Oprel does not exercise any managerial authority. Instead, indications are that he is employed on the same basis as other employees. The Board has in

the past held that a familial relationship is not in and of itself a sufficient basis for excluding an employee from a bargaining unit. See: *Hodgson's Steel & Ironworks Limited* [1976] OLRB Rep. May 312 and the cases cited therein. Accordingly, the Board's general practice is to include employees who are relatives of management persons in a bargaining unit. No representations were put before us as to why the Board should depart from this general practice in the circumstances of this case. Accordingly, we are not satisfied that Geoffrey Opriel should be excluded from the bargaining unit on the basis of his family connections.

11. Having regard to the above, we are satisfied that Geoffrey Opriel does have a sufficient community of interest with other employees to be included in the bargaining unit, and that his name is appropriately included on the list of bargaining unit employees.

12. There were six employees in the bargaining unit on the date of the filing of the application. The applicant filed evidence of membership on behalf of three of these employees. This evidence of membership takes the form of two combination applications for membership and receipts. The combination applications for membership are signed by the employees and the receipts are countersigned and indicate that a payment of \$1.00 has been made within the six month period immediately preceding the terminal date of the application. The applicant also filed one certificate of membership. The certificate is signed by the member and indicates that monthly dues of \$9.00 have been paid for at least one month within the six month period immediately preceding the terminal date of the application. The certificate is checked and certified correct by an officer of the applicant. The applicant also filed a duly completed Form 80, Declaration Concerning Membership Documents, Construction Industry. Given the applicant's membership position, the applicant cannot be certified unless it is selected by a majority of employees voting in a representation vote. Accordingly, a representation vote will be taken of employees in the following bargaining unit agreed to by the parties, namely:

all glaziers and glaziers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all glaziers and glaziers' apprentices in the employ of the respondent in all other sectors in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), save and except non-working foremen and persons above the rank of non-working foreman.

Those eligible to vote are all employees in the bargaining unit on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken.

13. Voters will be asked to indicate whether or not they desire to be represented by the applicant in their employment relations with the respondent.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING MAY 1984

BARGAINING AGENTS CERTIFIED

No Vote Conducted

1899-83-R: United Food and Commercial Workers International Union, A.F.L.,-C.I.O.,-C.L.C., (Applicant) v. Sunsqueeze Juices Incorporated, (Respondent).

Unit: "all employees, of the respondent at Guelph, Ontario, save and except forepersons and those persons above the rank of foreperson, office and sales staff." (23 employees in unit).

2493-83-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. X-Pert Metal Finishing Limited, (Respondent).

Unit: "all employees of the respondent in the City of Burlington, Ontario, save and except foremen, persons above the rank of foreman, and office, technical and sales staff." (48 employees in unit). (*Having regard to the parties*). (*Clarity Note*).

2808-83-R: Hotel Employees Restaurant Employees Union, (Applicant) v. National Caterers Hemlo Project, (Respondent) v. United Association of Plumbers and Steamfitters Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada Local Union 508, (Intervener).

Unit: "all employees of the respondent employed for the purposes of providing catering and housekeeping services at Noranda Mines Limited site at Hemlo, Ontario, save and except Chef and Head Camp Attendant, and persons above the rank of Chef and Head Camp Attendant, office and sales staff." (18 employees in unit). (*Having regard to the agreement of the parties*).

2987-83-R: Canadian Union of Public Employees, (Applicant) v. London & Middlesex County Roman Catholic Separate School Board, (Respondent).

Unit #1: "all office and clerical employees of the respondent in London and Middlesex County save and except office manager, persons above the rank of office manager, secretary to the superintendent of business, secretary to the superintendent of operations, secretary to the director of education, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and persons covered by subsisting collective agreements." (44 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all office and clerical employees of the respondent in London and Middlesex County regularly employed for not more than 24 hours per week and students employed during the school vacation period save and except office manager, persons above the rank of office manager, secretary to the superintendent of business, secretary to the superintendent of operations, secretary to the director of education and persons covered by subsisting collective agreements." (14 employees in unit). (*Having regard to the agreement of the parties*).

3014-83-R: United Steelworkers of America, (Applicant) v. Loctite Canada Inc., (Respondent).

Unit: "all employees of the respondent in the City of Mississauga, save and except supervisor, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (23 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

3017-83-R: Health, Office & Professional Employees, a division of Local 206, Retail, Commercial & Industrial Union, chartered by the United Food & Commercial Workers International Union, (Applicant) v. Domco Foodservices Limited, (Respondent).

Unit: "all employees of the respondent at the Guelph Correctional Services, Guelph, Ontario, save and except supervisors and persons above the rank of supervisor." (10 employees in unit).

3030-83-R: Labourers' International Union of North America, Local 183, (Applicant) v. Four Seasons Homes Ltd. (Respondent).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

3076-83-R: Ontario Nurses' Association, (Applicant) v. Au Chateau Home For the Aged, (Respondent).

Unit: "all registered and graduate nurses employed by the respondent in a nursing capacity in Sturgeon Falls, Ontario, save and except the director of nursing and persons above the rank of director of nursing." (4 employees in unit). (*Having regard to the agreement of the parties*).

3082-83-R: Teamsters Local Union No. 879, (Applicant) v. Lottridge Tire Limited, Welland Retread Limited, (Respondent).

Unit #1: "all employees of the respondent in the City of Welland and the City of St. Catharines, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period." (14 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent in the City of St. Catharines, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period." (8 employees in unit).

0064-84-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. T. Eaton Company Limited, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of the respondent at its retail store in the Scarborough Town Centre, Municipality of Metropolitan Toronto, save and except sales managers, merchandise presentation managers, food services managers, operating services managers, maintenance managers, and foremen, persons above the rank of sales manager, merchandise presentation manager, food services manager, operating services manager, maintenance manager or foreman, employees of Eaton Travel Ltd., employees of Eaton Bay Financial Services Ltd., office and clerical staff, management trainees, security staff, medical services nurse, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period and students employed on a co-operative program with a school, college or university." (86 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees regularly employed for not more than twenty-four hours per week and students employed during the school vacation period of the respondent at its retail store in the Scarborough Town Centre, Municipality of Metropolitan Toronto, save and except sales managers, merchandise presentation managers, food services managers, operating services managers, maintenance managers, and foremen, persons above the rank of sales manager, merchandise presentation manager, food services manager, operating services manager, maintenance manager, or foreman, employees of Eaton Travel

Ltd., employees of Eaton Bay Financial Services Ltd., office and clerical staff, management trainees, security staff, medical services nurse, and students employed on a co-operative program with a school, college or university." (128 employees in unit). (*Having regard to the agreement of the parties*).

0093-84-R: United Food and Commercial Workers International Union, (Applicant) v. 124646 Canada Inc., (Respondent) v. Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees, Local 88 and Canadian Union of Restaurant and Related Employees, (Intervenors).

Unit: "all waitresses, waiters, busboys, kitchen staff, cashiers and bartenders employed by the respondent at 1910 Bank Street in the City of Ottawa, save and except assistant hostesses and persons above the rank of assistant hostess." (39 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

0143-84-R: The Canadian Union of Public Employees, (Applicant) v. York Community Services Centre, (Respondent).

Unit #1: "all employees of the respondent in Metropolitan Toronto, save and except Executive Director, Assistant Executive Director, Secretary to the Executive Director, Bookkeeper and persons above those ranks, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (22 Employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: (*See Applications for Certification Dismissed — No Vote Conducted*).

0157-84-R: Labourers' International Union of North America, Local 527, (Applicant) v. Arnprior Builders' Supplies Division of M. Sullivan & Sons Limited, (Respondent).

Unit: "all employees of the respondent at Arnprior, Ontario save and except foremen, persons above the rank of foreman, office and clerical staff." (14 employees in unit). (*Having regard to the agreement of the parties*).

0159-84-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. T. Eaton Company Limited, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of the respondent at its retail store at 3003 Danforth Avenue, Metropolitan Toronto, save and except Sales Managers, Merchandise Presentation Managers, Food Service Managers and Foremen, persons above the rank of Sales Manager, Merchandise Presentation Manager, Food Service Manager or Foreman, office and clerical staff, employees of Eaton Travel Ltd., management trainees, Personnel Supervisor, Security Staff, Medical Services Nurse, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period and students employed on a co-operative programme with a school, college or university." (3 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Unit #2: "all employees of the respondent regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period, at the respondent's retail store at 3003 Danforth Avenue, Metropolitan Toronto, save and except Sales Managers, Merchandise Presentation Managers, Food Service Managers and Foremen, persons above the rank of Sales Manager, Merchandise Presentation Manager, Food Service Manager or Foreman, office and clerical staff, employees of Eaton Travel Ltd., management trainees, Personnel Supervisor, Security Staff, Medical Services Nurse and students employed on a co-operative programme with a school, college or university." (1 employee in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

0167-84-R: Office & Professional Employees International Union, (Applicant) v. Waterloo Regional Credit Union Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all office and clerical employees of the respondent in the Regional Municipality of Waterloo and in Ayr, Ontario, save and except Assistant Branch Manager, persons above the rank of Assistant Branch

Manager, Office Supervisor, Accountant, Assistant Accountant, Senior Credit Officer, the confidential secretary to the Administration Manager and students employed during the school vacation period.” (22 employees in unit). (*Having regard to the agreement of the parties*).

0168-84-R: Teamsters Chemical, Energy & Allied Workers Union Local 424, (Applicant) v. E. Harris Division of Bapco, (Respondent).

Unit: “all employees of the respondent at the Town of Markham save and except foremen, persons above the rank of foreman, office and sales staff.” (2 employees in unit). (*Having regard to the agreement of the parties*).

0177-84-R: Ontario Public Service Employees Union, (Applicant) v. Hotel Dieu Hospital, (Respondent).

Unit: “all medical laboratory technologists, medical laboratory technicians and their assistants employed by the respondent at Cornwall who are regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period as medical laboratory technologists, medical laboratory technicians and their assistants, save and except the Assistant Chief Technologist, persons above the rank of Assistant Chief Technologist, students employed on a cooperative training program, office and clerical staff and persons covered by a subsisting collective agreement between the Ontario Public Service Employees Union and the Hotel Dieu Hospital, Cornwall, Ontario.” (2 employees in unit). (*Having regard to the agreement of the parties*).

0178-84-R: United Brotherhood of Carpenters and Joiners of America, Local Union 93, (Applicant) v. Vie-Bilt General Contractors Inc., (Respondent).

Unit #1: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (1 employee in unit).

Unit #2: “all carpenters and carpenters’ apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (1 employee in unit).

0179-84-R: United Food and Commercial Workers International Union, Local 633, (Applicant) v. Bada Holding Co. Ltd., operating as Rose City I.G.A., (Respondent).

Unit: “all meat department employees of the respondent in the City of Windsor, Ontario, save and except the store manager, persons above the rank of store manager and persons employed for not more than 24 hours per week.” (10 employees in unit). (*Having regard to the agreement of the parties*).

0180-84-R: United Food & Commercial Workers International Union, Local 175, (Applicant) v. Bada Holding Co. Ltd., operating as Rose City I.G.A., (Respondent).

Unit: “all employees of the respondent in the City of Windsor, Ontario, save and except store manager, persons above the rank of store manager and full-time meat department employees.” (10 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

0181-84-R: Service Employees Union, Local 204, affiliated with S.E.I.U., A.F. of L., C.I.O., C.L.C., (Applicant) v. York-Finch General Hospital, (Respondent).

Unit: “all office and clerical employees of the respondent in Metropolitan Toronto, Ontario, save and except supervisors, persons above the rank of supervisor, secretaries to: the Executive Director, Associate Executive Director, Director of Nursing, Director of Personnel, Medical Staff Committee, Director of Finance, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (68 employees in unit). (*Having regard to the agreement of the parties*).

0191-84-R: Retail, Wholesale and Department Store Union, (Applicant) v. Factory Carpet, A Division of Carpita Corporation, (Respondent).

Unit #1: "all employees of the respondent at its retail outlets in Metropolitan Toronto, save and except Assistant Store Managers, persons above the rank of Assistant Store Manager, warehouse employees and office and clerical staff, and persons regularly employed for not more than twenty-four (24) hours per week." (16 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent at its retail outlets in Metropolitan Toronto regularly employed for not more than twenty-four (24) hours per week, save and except Assistant Store Managers, persons above the rank of Assistant Store Manager, office and sales staff." (7 employees in unit). (*Having regard to the agreement of the parties*).

Unit #3: "all employees of the respondent at its retail outlets in Metropolitan Toronto, save and except Assistant Store Managers, persons above the rank of Assistant Store Manager, office and sales staff and persons regularly employed for not more than twenty-four (24) hours per week." (9 employees in unit). (*Having regard to the agreement of the parties*).

0200-84-R: Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs Warehousemen and Helpers of America, (Applicant) v. MI Movers International Transport Services Ltd., (Respondent).

Unit: "all employees of the respondent in Mississauga, Ontario, save and except supervisors, those above the rank of supervisor, head dispatcher, office, clerical and sales staff." (12 employees in unit). (*Having regard to the agreement of the parties*).

0207-84-R: Canadian Union of Operating Engineers and General Workers, (Applicant) v. Sadema Lumber Products Limited, (Respondent).

Unit: "all employees of the respondent employed at Windsor, save and except forepersons, those above the rank of foreperson, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (16 employees in unit). (*Having regard to the agreement of the parties*).

0208-84-R: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. Triple E Canada Ltd., (Respondent).

Unit: "all employees of the respondent at Guelph, Ontario, save and except foremen, persons above the rank of foreman, and office and sales staff." (19 employees in unit). (*Having regard to the agreement of the parties*).

0217-84-R: United Steelworkers of America, (Applicant) v. K Red Top Equipment Company Limited, (Respondent).

Unit: "all employees of the respondent at Orillia, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (14 employees in unit). (*Having regard to the agreement of the parties*).

0218-84-R The Canadian Union of Public Employees, (Applicant) v. Kinark Child and Family Services, (Respondent) v. Employee, (Objector).

Unit: "all employees of the respondent in Peterborough, Ontario, save and except supervisors and persons above the rank of supervisor." (39 employees in unit). (*Having regard to the agreement of the parties*).

0236-84-R: Sheet Metal Workers' International Association, Local Union 397, (Applicant) v. Ostaff Engineering, (Respondent).

Unit #1: "all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the

Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

0237-84-R: Ironworkers District Council of Ontario, (Applicant) v. Ostaff Engineering Inc., (Respondent).

Unit #1: "all ironworkers and ironworkers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all ironworkers and ironworkers' apprentices in the employ of the respondent in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

0249-84-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., (Applicant) v. 442654 Ontario Incorporated carrying on business as A.W.K. Industrial Coating, (Respondent).

Unit: "all employees of the respondent in Chatham Township, save and except foremen, persons above the rank of foreman, office and sales staff." (85 employees in unit). (*Clarity Note*).

0267-84-R: Ouvriers Unis des Textiles d'Amerique, United Textile Workers of America, — Local 565, (Applicant) v. Co-Operative Agricole St. Eugene Ltee, Co-Operative Agricole St. Eugene Ltd., (Respondent).

Unit: "all employees of the respondent situated in St. Eugene, Ontario, save and except salesmen, office staff, foremen and those above the rank of foreman." (5 employees in unit).

0276-84-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. Gus Brown Pontiac Buick Ltd., (Respondent).

Unit: "all employees of the respondent in Whitby, Ontario, save and except foremen, persons above the rank of foremen, office, clerical and sales staff, service writers, tower operator, students employed during the school vacation period and employees regularly employed for not more than 24 hours per week." (35 employees in unit). (*Having regard to the agreement of the parties*).

0279-84-R: Local 47 Sheet Metal Workers' International Association, (Applicant) v. G. St-Jacques Inc., (Respondent).

Unit #1: "all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

0298-84-R: United Brotherhood of Carpenters and Joiners of America, Local 93, (Applicant) v. Construction P. H. Grager Inc., (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

0302-84-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. Thermetic Controls, (Respondent).

Unit: "all employees of the respondent in the City of Mississauga, save and except foremen, persons above the rank of foreman, office, sales, technical and professional staff, students employed during the school vacation period and persons regularly employed for not more than twenty-four (24) hours per week." (35 employees in unit). (*Having regard to the agreement of the parties*).

0331-84-R: Ontario Nurses' Association, (Applicant) v. Matthews Memorial Division of Plummer Memorial Public Hospital, (Respondent).

Unit #1: "all registered and graduate nurses employed in a nursing capacity by the respondent at Richard's Landing, Ontario, save and except the Nurse Administrator, persons above the rank of Nurse Administrator and persons regularly employed for not more than twenty-four (24) hours per week." (3 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all registered and graduate nurses employed in a nursing capacity by the respondent at Richard's Landing, Ontario, regularly employed for not more than twenty-four (24) hours per week, save and except the Nurse Administrator and persons above the rank of Nurse Administrator." (6 employees in unit). (*Having regard to the agreement of the parties*).

0332-84-R: Ontario Nurses Association, (Applicant) v. Central Park Lodge, (Respondent).

Unit #1: "all registered and graduate nurses employed in a nursing capacity by the respondent at London, Ontario, save and except care co-ordinator, persons above the rank of care co-ordinator and registered and graduate nurses regularly employed for not more than twenty-four (24) hours per week." (3 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all registered and graduate nurses employed in a nursing capacity by the respondent at London, Ontario, who are regularly employed for not more than twenty-four (24) hours per week save and except care co-ordinator and persons above the rank of care co-ordinator." (3 employees in unit). (*Having regard to the agreement of the parties*).

0338-84-R: International Brotherhood of Painters and Allied Trades — Local Union 1891, (Applicant) v. Manel Contracting, (Respondent).

Unit #1: "all painters and painters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all painters and painters' apprentices in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

0339-84-R: The Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, on behalf of Locals 1007; 1151; 1244; 1410; 1425; 1592; 1916 and 2309, (Applicant) v. Canadian Machinery Movers Ltd., (Respondent).

Unit #1: "all millwrights and millwrights' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in unit).

Unit #2: "all millwrights and millwrights' apprentices in the employ of the respondent in the Counties of Essex and Kent, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in unit).

0348-84-R: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, local Union 6478, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Central Bakery of Toronto Limited, (Respondent).

Unit: "all drivers salesmen, route drivers, and spare drivers of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, those above the rank of supervisor, clerical, office and sales staff." (15 employees in unit). (*Having regard to the agreement of the parties*).

0352-84-R: Southern Ontario Newspaper Guild Local 87, The Newspaper Guild (CLC-AFL-CIO), (Applicant) v. The Spectator, a Division of Southam Inc., (Respondent).

Unit: "all employees in the mailroom of the respondent in the City of Hamilton regularly employed for not more than twenty-four hours per week, save and except foremen, persons above the rank of foreman, clerical employees, persons covered by subsisting collective agreements and students assigned pursuant to a vocational school programme with Agnes MacPhail, Ainslie Wood, Parkview, Crestwood and Albion Schools or their successors." (400 employees in unit). (*Having regard to the agreement of the parties*)

0355-84-R: Ontario Public Service Employees Union, (Applicant) v. Port Colborne Ambulance Service Centre, (Respondent).

Unit: "all employees of the respondent employed in ambulance service operations in Port Colborne regularly employed for not more than twenty four (24) hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office and clerical staff and persons covered by a subsisting collective agreement." (10 employees in unit). (*Having regard to the agreement of the parties*).

0381-84-R: National Council of Canadian Labour, (Applicant) v. Ellens Cartage Limited, (Respondent).

Unit: "all employees of the respondent in the Town of Mitchell, Ontario, save and except foreman, persons above the rank of foreman, office staff, and persons regularly employed for not more than 24 hours per week." (10 employees in unit). (*Having regard to the agreement of the parties*).

0386-84-R: Labourers' International Union of North America, Local 527, (Applicant) v. Mt. Everest Construction Ltd., (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (17 employees in unit).

0390-84-R: Teamsters Local Union No. 230, Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen & Helpers, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Metro Mortar Supply Ltd., (Respondent).

Unit: "all employees of the respondent at Rexdale, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff." (9 employees in unit). (*Having regard to the agreement of the parties*).

0397-84-R: Office & Professional Employees International Union, (Applicant) v. The Hospital Commission, Sarnia General Hospital, (Respondent).

Unit: "all office and clerical employees of the respondent at Sarnia, Ontario regularly employed for not

more than twenty-four (24) hours per week, save and except Department Heads, persons above the rank of Department Head, Assistant Accountants (Business Office, Payroll, Accounts Payable), Secretaries to the Executive Director, to the Assistant Executive Directors and to the Director of Employee Relations, Administrative Assistants to the Directors of Radiology and Pathology, Secretary to the Director of Psychiatry, Electro cardiographers, Graduate Pharmacists, Physiotherapy Technician and students employed during the school vacation period.” (33 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

0398-84-R: The United Brotherhood of Carpenters and Joiners of America, Local 3054, (Applicant) v. Aura Yachts Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent at Huron Park, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (46 employees in unit). (*Having regard to the agreement of the parties*).

0402-84-R: Labourers’ International Union of North America, Local 183, (Applicant) v. The Frid Construction Company, Limited, (Respondent).

Unit: “all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (12 employees in unit).

0408-84-R: Labourers’ International Union of North America, Local 527, (Applicant) v. Remo Mannorino Inc., (Respondent).

Unit: “all construction labourers in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in unit).

0409-84-R: International Union of Operating Engineers, Local 793, (Applicant) v. Mt. Everest Construction Ltd., (Respondent).

Unit #1: “all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (12 employees in unit).

Unit #2: “all employees of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (12 employees in unit).

0418-84-R: Labourers’ International Union of North America, Local 1059, (Applicant) v. J-AAR Excavating Limited, (Respondent).

Unit #1: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry, in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

Unit #2: “all construction labourers in the employ of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce, and Elgin, excluding the industrial, commercial and institutional sector, save

and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

0419-84-R: The Canadian Union of Public Employees, (Applicant) v. Fred Victor Mission of the United Church of Canada, (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (26 employees in unit). (*Having regard to the agreement of the parties*).

0421-84-R: United Brotherhood of Carpenters & Joiners of America, Local 2679, (Applicant) v. Rockett Lumber & Building Supplies Limited, (Respondent).

Unit: "all employees of the respondent at Cooksville, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff." (39 employees in unit). (*Having regard to the agreement of the parties*).

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

2958-83-R: Service Employees Union, Local 204 Affiliated with S.E.I.U., A.F. of L., C.I.O., C.L.C., (Applicant) v. The St. Catharines General Hospital, (Respondent).

Unit: "all employees of the respondent in St. Catharines, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, professional staff, paramedical staff, office, clerical and technical staff and persons covered by subsisting collective agreement." (116 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Number of names of persons on revised voters' list		119
Number of persons who cast ballots	49	
Number of ballots excluding segregated ballots cast by persons whose name appear on voters' list		46
Number of ballots marked in favour of applicant		42
Number of ballots marked against applicant		4
Ballots segregated and not counted		3

3054-83-R: Canadian Union of Public Employees, (Applicant) v. St. Joseph's Health Centre, (Respondent) v. Service Employees Union, Local 204, (Intervener).

Unit: "all employees of the respondent in Metropolitan Toronto regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except professional medical staff, graduate nursing staff, under-graduate nurses, graduate pharmacists, under-graduate pharmacists, graduate dietitians, student dietitians, technical personnel, supervisors, persons above the rank of supervisor, chief engineer, office staff, and persons covered by subsisting collective agreements." (171 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		170
Number of persons who cast ballots	86	
Number of ballots marked in favour of applicant		79
Number of ballots marked against applicant		7

0022-84-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., (Applicant) v. Maple Leaf Monarch Company, (Respondent) v. Windsor Grain Processors Union, (Intervener).

Unit: "all employees of the respondent in its Windsor plant save and except co-ordinators, persons above

the rank of co-ordinator, scheduling, administrative and office staff, safety officer, sales, technical and engineering staff, draftsmen, security guards, students and those working for twenty-four (24) hours or less per week." (91 employees in unit).

Number of names of persons on revised voters' list		91
Number of persons who cast ballots	83	
Number of ballots marked in favour of applicant		68
Number of ballots marked in favour of intervener		15

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

2610-83-R: United food and Commercial Workers International Union, (Applicant) v. 538492 Ontario Limited, c.o.b. as Leamington I.G.A., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Leamington, Ontario, save and except head cashier, meat manager, produce manager, persons above the rank of head cashier, meat manager and produce manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (50 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared		15
Number of persons who cast ballots	13	
Number of ballots marked in favour of applicant		10
Number of ballots marked against applicant		3

2757-83-R: Service Employees International Union, (Applicant) v. Empire Maintenance Industries Inc., (Respondent).

Unit: "all employees of the respondent at the University of Ottawa, Ottawa, Ontario, save and except resident foreman, persons above the rank of resident foreman, office, clerical and sales staff." (38 employees in unit).

Number of names of persons on revised voters' list		46
Number of persons who cast ballots	34	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		15
Number of ballots marked against applicant		13
Ballots segregated and not counted		5

Applications for Certification Dismissed — No Vote Conducted

2960-83-R: Labourers' International Union of North America, Local 493, (Applicant) v. Sudbury Science Centre, (Respondent). (25 employees in unit).

2995-83-R: Labourers' International Union of North America, Local 183, (Applicant) v. Canada's Capital Building Services Limited, (Respondent). (240 employees in unit).

3114-83-R: Canadian Labour Congress Chartered, Local 1698, (Applicant) v. 367402 Ontario Ltd., (Respondent). (12 employees in unit).

0143-84-R: The Canadian Union of Public Employees, (Applicant) v. York Community Services Centre, (Respondent).

Unit #1: (*See Bargaining Agents Certified — No Vote Conducted*).

Unit #2: "all employees of the respondent in Metropolitan Toronto regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except the

Executive Director, Assistant Executive Director, Secretary to the Executive Director, Bookkeeper, and persons above those ranks." (6 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

0145-84-R: The Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, on behalf of Locals 1007; 1151; 1244; 1410; 1425; 1592; 1916 and 2309, (Applicant) v. Canadian Porcelain Company, Limited, (Respondent) v. Aluminum, Brick and Glass Workers International Union, AFL-CIO-CLC, and its Local 249, (Intervener). (7 employees in unit).

0253-84-R: Canadian Union of Public Employees, (Applicant) v. Corporation of the Town of Onaping Falls, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Onaping Falls, Ontario, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (26 employees in unit). (*Having regard to the agreement of the parties*).

Application for Certification Dismissed Subsequent to a Pre-Hearing Vote

3026-83-R: Service Employees Union, Local 204, affiliated with S.E.I.U., A. F. of L., C.I.O. C.L.C., (Applicant) v. The Ontario Cancer Institute, (Respondent).

Unit: "all employees of the respondent at its Princess Margaret Hospital and lodge in Metropolitan Toronto, Ontario, save and except professional medical and scientific staff, registered nurses graduate nurses, undergraduate nurses, persons engaged in research work, paramedical personnel, supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation periods." (237 employees in unit). (*Clarity Note*).

Number of names of persons on revised voters' list		239
Number of persons who cast ballots	217	
Number of spoiled ballots		2
Number of ballots marked in favour of applicant		64
Number of ballots marked against applicant		149
Ballots segregated and not counted	2	

0158-84-R: National Council of Canadian Labour, (Applicant) v. Newlands Textiles Inc., (Respondent) v. Amalgamated Clothing and Textile Workers Union, AFL-CIO-CLC, Local 1740, (Intervener).

Unit: "all employees of the respondent in Cambridge, Ontario, save and except supervisors, foremen, assistant foremen, foreladies, persons above the rank of supervisor, foreman, assistant foreman and forelady, laboratory personnel, office staff, and persons covered by subsisting collective agreements." (75 employees in unit).

Number of names of persons on revised voters' list		75
Number of persons who cast ballots	74	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		15
Number of ballots marked in favour of intervener		58

Application for Certification Dismissed Subsequent to a Post-Hearing Vote

2685-83-R: United Steelworkers of America, (Applicant) v. Canada Trustco Mortgage Company, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of the respondent in the Town of Kirkland Lake, save and except assistant

manager, persons above the rank of assistant manager, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (4 employees in unit).

Number of names of persons on list as originally prepared	5
Number of persons who cast ballots	5
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	3

Unit #2: "all employees of the respondent in the Town of Kirkland Lake regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except assistant manager and persons above the rank of assistant manager." (3 employees in unit).

Number of names of persons on list as originally prepared	2	2
Number of persons who cast ballots	2	
Number of ballots marked in favour of applicant		1
Number of ballots marked against applicant		1

2843-83-R: Graphic Communications International Union — Local 466, (Applicant) v. Graphic Web A Division of Quebecor Group Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent, save and except foreman, persons above the rank of foreman, office staff and sales staff." (74 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		73
Number of persons who cast ballots	59	
Number of ballots marked in favour of applicant		17
Number of ballots marked against applicant		42

3019-83-R: Service Employees Union, Local 210, Affiliated with Service Employees International Union, A.F.L.-C.I.O.-C.L.C., (Applicant) v. Edmund K. Lo Drugs Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of Edmund K. Lo Drugs Ltd. at Shoppers Drug Mart located at Tecumseh Mall in Windsor, Ontario, save and except Pharmacists, Merchandise Manager and persons above the rank of Merchandise Manager." (27 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		26
Number of persons who cast ballots	24	
Number of segregated ballots cast by persons whose names appear on voters' list		1
Number of ballots marked in favour of applicant		6
Number of ballots marked against applicant		17

0146-84-R: Bakery, Confectionery & Tobacco Workers' International Union Local 264, (Applicant) v. Elmira Refiners Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Paris, Ontario, save and except foremen, foreladies, persons above the rank of foreman and forelady and office staff." (7 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		5
Number of persons who cast ballots	5	
Number of ballots marked in favour of applicant		0
Number of ballots marked against applicant		5

APPLICATIONS FOR CERTIFICATION WITHDRAWN

1791-83-R: United Brotherhood of Carpenters and Joiners of America, Local 494, (Applicant) v. Motorco Savings & Credit Union Limited, (Respondent).

2381-83-R: United Brotherhood of Carpenters and Joiners of America, Local Union 93, (Applicant) v. Macand Construction Limited, (Respondent).

2533-83-R; 2534-83-R: International Brotherhood of Electrical Workers, Local 353, (Applicant) v. Stearns Catalytic Ltd., (Respondent) v. International Brotherhood of Electrical Workers, (Intervener).

2904-83-R: Ironworkers District Council of Ontario, (Applicant) v. Waldmarc Glass & Industries Ltd., (Respondent) v. Ontario Council of the International Brotherhood of Painters and Allied Trades, (Intervener).

2914-83-R: Canadian Union of Operating Engineers & General Workers, (Applicant) v. Yonge-Eglinton Centre Management Services, (Respondent).

3024-83-R; 3025-83-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 91, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Northwood Hotels "Pembroke" Limited, c.o.b. as Executive Inn and Pembroke Roller-Racquet, (Respondent) v. Group of Employees, (Objectors).

3112-83-R: United Food and Commercial Workers International Union, Local 175, (Applicant) v. Southland Canada Inc. c.o.b. as 7 Eleven, (Respondent).

0021-84-R: United Food and Commercial Workers International Union, (Applicant) v. Famz Food Limited, (Respondent) v. Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees, Local 88, and Canadian Union of Restaurant and Related Employees, (Intervener).

0110-84-R: United Brotherhood of Carpenters & Joiners of America, Local 2041, (Applicant) v. D'Angelo Plastering Co. (1983) Limited, (Respondent), OP & C.M.I.A. Local 124 Ottawa, Ontario, (Intervener #1) v. Labourers International Union of North America Ontario Provincial District Council and Labourers International Union of North America Local 527, (Intervener #2).

0219-84-R: The Canadian Union of Public Employees, (Applicant) v. Cradleship Creche of Metropolitan Toronto, (Respondent). (*Withdrawn*).

0273-84-R: Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees Union, Local 88, AFL-CIO-CLC, (Applicant) v. Foodcorp Limited, (Respondent) v. United Food and Commercial Workers International Union, (Intervener).

0277-84-R: Graphic Communications International Union, Local 500M Toronto, Ontario, (Applicant) v. Batten Gravure Cylinders Limited, (Respondent).

0306-84-R: International Union of Operating Engineers, Local 793, (Applicant) v. Disa Construction and Engineering Ltd., (Respondent).

0322-84-R: Representatives Association of Ontario, (Applicant) v. Retail, Wholesale and Bakery & Confectionary Workers Union Local 461 of the RWDSU, AFL-CIO-CLC, (Respondent).

0410-84-R: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. Electrohome Limited, (Respondent).

0453-84-R: United Steelworkers of America, (Applicant) v. Opus Ferrum Limited, (Respondent).

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

2984-83-R: United Brotherhood of Carpenters and Joiners of America, Local 1190, (Applicant) v. Attica Investments Inc., carrying on business as Fairbank Carpentry Company, E. & R. Carpentry Inc., (Respondents). (*Granted*).

3068-83-R: International Brotherhood of Electrical Workers, Local 353, (Applicant) v. Taywood Electrical Contractors Limited Taywood Controls Limited, (Respondent) v. Local 1590 — International Brotherhood of Electrical Workers, (Intervener). (*Withdrawn*).

0185-84-R: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Century Store Fixtures Ltd., Jasper Construction Inc. and Jascan Properties Inc., (Respondents). (*Dismissed*).

0216-84-R: United Brotherhood of Carpenters and Joiners of America, Local 1190, (Applicant) v. Apoca Carpenters Ltd. and Vision Carpentry Ltd., (Respondents). (*Granted*).

SALE OF A BUSINESS

0637-83-R: The International Brotherhood of Electrical Workers, Local 636, (Applicant) v. Dominion Electric Protection Company carrying on business as ADT Security Systems and ADT Energy Systems Ltd., (Respondents). (*Withdrawn*).

1463-83-R: Retail Wholesale and Department Store Union, Local 414, (Applicant) v. 555190 Ontario Ltd. carrying on business as Valencia Foods, (Respondent). (*Dismissed*).

3068-83-R: International Brotherhood of Electrical Workers, Local 353, (Applicant) v. Taywood Electrical Contractors Limited Taywood Controls Limited, (Respondents) v. Local 1590 — International Brotherhood of Electrical Workers, (Intervener). (*Withdrawn*).

3096-83-R: Sheet Metal Workers' International Association, Local Union 540, (Applicant) v. Ceilcote Canada, a Division of General Signal Limited and Bavscott Enterprises Limited, (Respondents). (*Withdrawn*).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

2296-83-R: Case Verhagen, (Applicant) v. Christian Labour Association of Canada, (Respondent) v. Abcott Construction Limited, (Intervener).

Unit: "all employees of Abcott Construction Limited working in the province of Ontario save and except office staff, non-working foremen and those above the rank of non-working foreman." (7 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared		2
Number of persons who cast ballots	2	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		2

2641-83-R: The Employees of Patro d'Ottawa (Patro Ottawa) (Elaine Deschamps), (Applicant) v.

Canadian Union of Public Employees, (Respondent) v. Patro d'Ottawa, (Intervener). (55 employees in unit). (*Dismissed*).

2652-83-R: David L. Evans, (Applicant) v. Teamsters Local 880, (Respondent) v. Murphy Distributing (Sarnia) Ltd., (Intervener).

Unit: "all employees of Murphy Distributing (Sarnia) Ltd., save and except foremen, persons above the rank of foreman, office staff and sales staff." (6 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared		6
Number of persons who cast ballots	6	
Number of ballots marked in favour of applicant		0
Number of ballots marked against respondent		6

2860-83-R: Bruce Chapple, (Applicant) v. United Steel Workers of America, Local 8953, (Respondent).

Unit: "all employees of Hall Engineering (Ont.) Ltd. in Cambridge, save and except Foreman, persons above the rank of Foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (26 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared		28
Number of persons who cast ballots	26	
Number of ballots excluding segregated ballots cast by persons whose name appear on voters' list		25
Number of segregated ballots cast by persons whose name appear on voters' list		1
Number of ballots marked in favour of respondent		5
Number of ballots marked against respondent		20

2978-83-R: John Schnarr, (Applicant) v. United Brotherhood of Carpenters and Joiners of America, Local 785, (Respondent) v. Watcon Incorporated, (Intervener).

Unit: "all carpenters and carpenters' apprentices in the employ of Watcon Incorporated employed in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen". (7 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared		2
Number of persons who cast ballots	2	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		2

0368-84-R: Vanda Maria Cervi, (Applicant) v. International Brotherhood of Teamsters, Chemical, Energy and Allied Workers Local 424, (Respondent). (4 employees in unit). (*Withdrawn*).

REFERRAL AS TO APPOINTMENT OF CONCILIATION OFFICER

2617-83-M: Lake of the Woods District Hospital, (Employer) v. Canadian Union of Public Employees, Local 822, (Trade Union). (*Dismissed*).

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

0561-84-U: Metropolitan Toronto Sewer and Watermain Contractors Association, (Applicant) v.

International Union of Operating Engineers, Local 793, Peter Dimitruk, John Ricciuto, Frank Giles and Joe Kennedy, (Respondents). (*Granted*).

APPLICATIONS FOR DECLARATION OF UNLAWFUL LOCKOUT

3113-83-U: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 552, (Applicant) v. The Board of Education for the City of Windsor, (Respondent). (*Granted*).

0240-84-U: The Canadian Union of Public Employees Local 134 (Cafeteria), (Applicant) v. The Board of Education for the City of Toronto, (Respondent). (*Withdrawn*).

COMPLAINTS OF UNFAIR LABOUR PRACTICE

0850-83-U: Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 597, (Complainant) v. C. E. Lummus Canada Ltd., (Respondent) v. Labour Relations Bureau of the Ontario General Contractors Association, (Intervener). (*Granted*).

1413-83-U: Endel Vesik, (Complainant) v. Consolidated Fastfrate Limited, McNeil McGrath Transport Inc. and Teamsters Union Local 938, (Respondents). (*Granted*).

1448-83-U: The International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local #58, Toronto, (Complainant) v. Harbourfront Corporation, (Respondent). (*Granted*).

1937-83-U: United Food and Commercial Workers International Union A.F.L.-C.I.O.-C.L.C., (Complainant) v. Sunsqueeze Juices Incorporated, (Respondent). (*Granted*).

2379-83-U: United Food and Commercial Workers International Union A.F.L.-C.I.O.-C.L.C., (Complainant) v. Sunsqueeze Juices Incorporated, (Respondent). (*Granted*).

2444-83-U: Jeanette Kirkpatrick, (Complainant) v. The Canadian Union of Public Employees, Local 1329, Canadian Union of Public Employees, Grace Hartman, Gordon J. Allan, Paul Gilbert, and John Vlahovic, (Respondents) v. The Corporation of the Town of Oakville, (Employer). (*Granted*).

2594-83-U: William Frederick Burrows, (Complainant) v. Lloyd McHugh & Son Limited and The International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of The United States and Canada and Local 345 of The International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of The United States and Canada, (Respondents). (*Granted*).

2619-83-U: Ivan Moro, (Complainant) v. Hotel Employees & Restaurant Employees Union Local 75, and King Edward Hotel, (Respondents). (*Withdrawn*).

2701-83-U: Danny Coleman, (Complainant) v. Local Union No. 173, Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Respondent) v. Koch Transport Ltd., (Intervener). (*Dismissed*).

2747-83-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Complainant) v. Office Equipment of Canada Ltd., (Respondent). (*Withdrawn*).

2907-83-U: McMaster Security Officers Association, (Complainant) v. McMaster University, (Respondent). (*Withdrawn*).

2930-83-U: John Tobin, (Complainant) v. Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America and Local Union 1916, (Respondents). (*Withdrawn*).

2973-83-U: Frederick William LeBlanc, (Complainant) v. U.A.W. Local 303, (Respondent). (*Withdrawn*).

2974-83-U: Bruno Fazzini, (Complainant) v. Aluminum Brick & Glass Workers, (Respondent) v. Consumers Glass Company Limited, (Intervener). (*Withdrawn*).

3018-83-U: Retail, Commercial & Industrial Union, Local 206, chartered by the United Food & Commercial Workers International Union, (Complainant) v. Budget Car Rentals Toronto Ltd., (Respondent). (*Withdrawn*).

3021-83-U: Jean Skyers, (Complainant) v. London and District Service Workers' Union, Local 220, (Respondent). (*Dismissed*).

3031-83-U: United Food & Commercial Workers, Local 1984, Kraus Carpets Employees Association, (Complainant) v. Waterloo Spinning Mills Limited, (Respondent). (*Withdrawn*).

3039-83-U: Lloyd-Traux Limited, (Complainant) v. The United Brotherhood of Carpenters and Joiners of America Local 3054, Adam Salvona, Elmer Schultz, Willa Harris and Barbara Hallman, (Respondents). (*Withdrawn*).

3048-83-U: Abraham Mayne, (Complainant) v. Local 8412, of the United Steelworkers of America, (Respondents). (*Dismissed*).

3073-83-U: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 91, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and helpers of America, (Complainant) v. Roofmart (Ontario) Limited, (Respondent). (*Withdrawn*).

3083-83-U: Canadian Union of Public Employees, (Complainant) v. Niagara Ina Grafton Gage Home, (Respondent). (*Withdrawn*).

3089-83-U: United Brotherhood of Carpenters and Joiners of America, Local 2759, (Complainant) v. G. W. Martin Lumber Limited, (Respondent). (*Withdrawn*).

3095-83-U: Carpenters District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Complainant) v. Century Construction Co., Division of 404933 Ontario Limited, (Respondent). (*Granted*).

3097-83-U: International Beverage Dispensers and Bartenders Union, Local 280, (Complainant) v. The West Hill Hotel (c.o.b. as the West Hill Tavern), (Respondent). (*Withdrawn*).

3111-83-U: United Food and Commercial Workers International Union, Local 175, (Complainant) v. Southland Canada Inc. c.o.b. as 7 Eleven, (Respondent). (*Withdrawn*).

3120-83-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Complainant) v. Ontario Motor League Elgin-Norfolk Club and Ontario Motor League World Wide Travel Agency (St. Thomas) Ltd., (Respondent). (*Withdrawn*).

0003-84-U: Olimpia Ciconte, (Complainant) v. Ethyl Imco Ltd., Aluminum, Brick and Glass Workers, Local #243G, (Respondent). (*Withdrawn*).

0007-84-U: Service Employees International Union, (Complainant) v. Empire Maintenance Industries, (Respondent). (*Withdrawn*).

0013-84-U: United Electrical, Radio and Machine Workers of America (UE), (Applicant) v. Canadian Steelmaster Co. Limited, (Respondent). (*Withdrawn*).

0014-84-U: Scott D Neal, (Complainant) v. International Brotherhood of Firemen & Oilers, Local 101, (Respondent) v. Nabisco Brands Ltd., (Intervener). (*Withdrawn*).

0015-84-U: Adelino De Silva & Manuel Pimenta, (Complainants) v. Hotel Employees Restaurant Employees Union, Local 75, (Respondent). (*Withdrawn*).

0016-84-U: Schneiders Office Employees Association, (Complainant) v. J. M. Schneider Inc. and Link Services Inc., (Respondents). (*Withdrawn*).

0033-84-U: Louis William McMichael, (Complainant) v. United Rubber, Cork, Linoleum and Plastic Workers of America, Local 73, (Respondent). (*Withdrawn*).

0042-84-U: Lori Clark and Dorothy Dafoe, (Complainants) v. Service Employees Union, Local 183 and Fireside Inn, (Respondent). (*Withdrawn*).

0049-84-U: John D. Young, (Complainant) v. Olympus Plastics Limited, (Respondent). (*Withdrawn*).

0050-84-U: Alan Cantlay, (Complainant) v. The Jack Colden Limited Employees Association, (Respondent). (*Withdrawn*).

0053-84-U: Alan Cantlay, (Complainant) v. Jack Colden Limited, (Respondent). (*Withdrawn*).

0055-84-U: Randy Nicholas, (Complainant) v. Bricklayers Independent Union of Canada, (Respondent). (*Withdrawn*).

0057-84-U: Royal Ontario Museum Curatorial Association, (Complainant) v. Royal Ontario Museum, (Respondent). (*Withdrawn*).

0067-84-U: Alistair Campbell Macuay Cunningham, (Complainant) v. Don Dingwall, (Respondent). (*Withdrawn*).

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0085-84-U: The United Food and Commercial Workers International Union; Canadian Labour Congress, (Complainant) v. Autotube Limited, (Respondent). (*Withdrawn*).

0104-84-U: Elizabeth Crawford, (Complainant) v. Hotel Employees, Restaurant Employees Union, Local 75 Sheraton Centre Hotel, (Respondent). (*Withdrawn*).

0114-84-U: Canadian Union of Operating Engineers and General Workers, Local 101, (Complainant) v. Durham Cemetery Board, (Respondent). (*Withdrawn*).

0123-84-U: United Food and Commercial Workers Union, Local 1984, (Complainant) v. Kraus Carpet Mills Limited, Waterloo Spinning Mills Limited, Strudex Fibres Ltd., Kraus Carpet Mills Limited, c.o.b. as Chrome Print and Varichrome Yarns, John Lukezic, John Eckhard, (Respondents). (*Withdrawn*).

0125-84-U: Soft Drink Workers' Joint Local Executive Board, (Complainant) v. Coca-Cola Ltd., (Respondent). (*Withdrawn*).

0133-84-U: P. Eric Rice, (Complainant) v. Park Plastic Products Ltd., (Respondent). (*Withdrawn*).

0151-84-U: David Dedman, (Complainant) v. Locals 633 & 175 United Food & Commercial Workers International, (Respondent). (*Withdrawn*).

0152-84-U: Kasar Persuad, (Complainant) v. Heintzman Limited (Chair Division), (Respondent). (*Withdrawn*).

0153-84-U: Kasar Persuad, (Complainant) v. Upholsterer's International Union of North America, (Respondent). (*Withdrawn*).

0172-84-U: The United Brotherhood of Carpenters and Joiners of America, Local 3054, (Complainant) v. Lloyd-Traux Limited, (Respondent). (*Withdrawn*).

0193-84-U: Gaetane Masse, (Complainant) v. International Leather Goods Plastics and Novelty Workers Union, (Respondent). (*Withdrawn*).

0194-84-U: Marsha Harris, (Complainant) v. Bob Peters — Plant Chairman & United Autoworkers Union Local 222, (Respondents). (*Withdrawn*).

0195-84-U: Donato Sabatini, (Complainant) v. Union Local 506, (Respondent). (*Withdrawn*).

0209-84-U: Health, Office & Professional Employees, a division of Local 206, Retail, Commercial & Industrial Union, chartered by the United Food & Commercial Workers International Union, (Complainant) v. Domco Food Services Ltd., (Respondent). (*Withdrawn*).

0228-84-U: Cynthia Joseph, (Complainant) v. Ontario Nurses Association, (Respondent). (*Withdrawn*).

0230-84-U: Michael T. Husul, (Complainant) v. International Union of Operating Engineers Local 772 and Ed Herechuk, Business Agent of Local 772, (Respondent). (*Withdrawn*).

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0244-84-U: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.) and it's local No. 1285, (Complainant) v. Trident Automotive Products Inc., (Respondent). (*Withdrawn*).

0262-84-U: Robert Seymour, (Complainant) v. Bargaining Committee of Local 7155 United Steel Workers and Wilf Bowan Local President, (Respondent). (*Withdrawn*).

0280-84-U: Gregory L. McGabe, (Complainant) v. C.U.P.E. Local 1000, (Respondent). (*Withdrawn*).

0345-84-U: Canadian Union of Operating Engineers and General Workers, (Complainant) v. Yonge-Eglinton Centre Management Services, (Respondent). (*Withdrawn*).

0387-84-U: R. Black, S. Borwczuk, R. Collett, L. Coconato, et al., (Complainants) v. Service Employees Union, Local 268, Thunder Bay, (Respondent). (*Withdrawn*).

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0060-84-M: Dellelce Construction & Equipment, (Employer) v. United Steelworkers of America, (Trade Union). (*Granted*).

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2862-83-M: The Ontario Cancer Treatment and Research Foundation, (Applicant) v. Ontario Nurses' Association, (Respondent). (*Withdrawn*).

3003-83-M: Canadian Union of Public Employees, Local 2210, (Applicant) v. The Regional Municipality of Haldimand-Norfolk, (Respondent). (*Withdrawn*).

0034-84-M: Office & Professional Employees International Union, Local 343, (Applicant) v. Hamilton Municipal Employees' Credit Union Limited, (Respondent). (*Withdrawn*).

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2897-83-OH: Larry E. Peshke, (Complainant) v. Contractors Clean Up Service, Bolton, Ontario, (Respondent). (*Withdrawn*).

3049-83-OH: Gerald Anthony Montreuil, (Complainant) v. Canadian Panels Limited, (Respondent). (*Withdrawn*).

0080-84-OH: Michael Bonnici, Dennis Cashaback, George Crankshaw, Mitchell Jackson, Niles Quenneville, (Complainants) v. Rayco Stamping Products Ltd., (Respondent). (*Withdrawn*).

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2276-83-M: United Brotherhood of Carpenters and Joiners of America, Local 38, (Applicant) v. A. Volpatti Plastering & Construction Ltd., (Respondent). (*Withdrawn*).

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2971-83-M: Ontario Allied Construction Trades Council, International Association of Heat and Frost Insulators and Asbestos Workers, (Applicant) v. The Electrical Power Systems Construction Association and Ontario Hydro and Manville Canada Limited, (Respondent). (*Withdrawn*).

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3103-83-M: Labourers' International Union of North America, Local 1059, (Applicant) v. Advanced Concrete Services Limited, (Respondent). (*Withdrawn*).

0001-84-M: United Brotherhood of Carpenters and Joiners of America, Local 785, (Applicant) v. Paul K. Mace Interior Supply Limited, (Respondent). (*Granted*).

0056-84-M: Sheet Metal Workers International Association, Local 235, (Applicant) v. Tradesmen Fabricating Ltd., (Respondent). (*Granted*).

0118-84-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Appeal Contractors, (Respondent). (*Withdrawn*).

0156-84-M: Local 1316, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Marel Construction Limited, (Respondent). (*Granted*).

0164-84-M: International Union of Operating Engineers, Local 793, (Applicant) v. Nadrofsky Corporation, (Respondent). (*Withdrawn*).

0198-84-M: United Brotherhood of Carpenters and Joiners of America, Local 18, (Applicant) v. Ray Lee, carrying on business as L & L Associates, (Respondent). (*Granted*).

0199-84-M: IBEW Construction Council of Ontario and International Brotherhood of Electrical Workers, Local 1739, (Applicant) v. Colonial Electric Limited, (Respondent). (*Granted*).

0215-84-M: United Brotherhood of Carpenters and Joiners of America, Local 1190, (Applicant) v. Apoca Carpenters Ltd. and Vision Carpentry Ltd., (Respondents). (*Withdrawn*).

0224-84-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Beverly Weatherstrip Co. Ltd., (Respondent). (*Withdrawn*).

0246-84-M: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. Jeeter Insulation Ltd., (Respondent). (*Granted*).

0247-84-M: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. Hencze Insulation Limited, (Respondent). (*Granted*).

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0330-84-M: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, (Applicant) v. M. Alzner Contractors Ltd., (Respondent). (*Granted*).

0347-84-M: Labourers' International Union of North America, Ontario Provincial District Council and Local 183, (Applicant) v. Lisgar Construction Co. (Respondent). (*Withdrawn*).

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0383-84-M: Labourers' International Union of North America, Local 183, (Applicant) v. Columbia Drain Concrete Ltd., (Respondent). (*Withdrawn*).

0384-84-M: Labourers' International Union of North America, Local 183, (Applicant) v. C. & F. Gatto Carpentry Contracting Ltd., operating as Ashton Carpentry, (Respondent). (*Granted*).

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0406-84-M: International Brotherhood of Painters and Allied Trades, Local Union 1891, (Applicant) v. William John Docherty carrying on business as Third Generation Painting & Paper Hanging, (Respondent). (*Granted*).

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Certification Withdrawn

*Ontario Labour Relations Board,
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KENNEDY LODGE INC., AND MEDOX HEALTH CARE SERVICES, A DIVISION OF DRAKE INTERNATIONAL INC., ET AL; RE SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 204

931

2942-83-R;2943-83-R Amalgamated Clothing & Textile Workers Union, Applicant, v. **Antonacci Clothes Inc.** and British Brand Clothes Limited, Respondent

Sale of a Business — Company discontinuing production function of clothing operation — Share-holder setting up own company to carry out production — Purchasing surplus equipment and hiring some former employees — Sale of part of business although location and brand name not acquired — Fact that persons other than former employees also hired not causing Board to direct vote

BEFORE: Owen V. Gray, Vice-Chairman, and Board Members F. C. Burnet and B. L. Armstrong.

APPEARANCES: *Paul Cavaluzzo and Jack Matraia for the applicant; M. E. Geiger and Patrick Antonacci for Antonacci Clothes Inc.; Carl Fruitman for British Brand Clothes Limited.*

DECISION OF VICE-CHAIRMAN OWEN V. GRAY AND BOARD MEMBER B. L. ARMSTRONG; July 10, 1984

1. These two applications were consolidated at hearing. In one, the applicant claims that "Antonocci Clothes" and "British Brand Clothing" carry on associated or related businesses under common control and direction, and asks for a declaration pursuant to subsection 1(4) of the *Labour Relations Act* that those respondents constitute one employer for the purposes of the Act. In the other application, the applicant claims there was a sale of business from "British Brand Clothing" to "Antonocci Clothing" in February, 1984, and asks for a declaration that the latter is bound by the terms of a "subsisting collective agreement" between British Brand and the applicant. At the hearing, the applicant filed a copy of the collective agreement on which it was relying. It is an expired collective agreement in which the employer is named "British Brand Clothes Limited", a name which its major shareholder, Carl Fruitman, confirmed was the correct name of that corporate respondent. The style of cause was amended accordingly. Counsel for the alleged successor filed a reply which stated, *inter alia*, that the correct name of that respondent was "Antonocci Clothing Inc.". That was amended at hearing to read "Antonacci Clothing Inc.". In all of the documentation produced by it at the hearing, including a contract prepared by the solicitor who incorporated it, the alleged successor is named "Antonacci Clothes Inc.". The Board has further amended the style of cause to describe that respondent by the name both it and its incorporating solicitor have consistently used to describe it.

2. The parties agree that the applicant's last agreement with British Brand Clothes Limited ("British Brand") expired November 30, 1983; there was no subsisting collective agreement between the applicant and British Brand at the time of its alleged sale of business to Antonacci Clothes Inc. ("Antonacci Clothes"). The parties also agree that if there has been a sale of business from British Brand to Antonacci Clothes, subsection 63(3) of the Act would apply and, subject to the respondent's argument that the Board should order a representation vote, the applicant would be entitled to continued bargaining rights with respect to a bargaining unit of employees "like" the unit of employees of British Brand for whom it had bargaining rights. The unit covered by the terms of the collective agreement filed with the Board consisted of all employees of that respondent, save and except shipping, receiving, warehouse and

maintenance employees, foremen, foreladies, persons above the rank of foreman or forelady, designers, office staff and sales staff.

I

3. British Brand has been in the clothing business since 1943. The first witness, Carl Fruitman, became a shareholder of British Brand in 1972. The then major shareholder was Fruitman's father-in-law, Sid Birken; other shares were owned by other members of the Birken family. At that time British Brand manufactured and sold clothing, primarily men's suits and pants, both wholesale to retail clothing dealers and retail from its own showroom. Both the showroom and the production facilities were located at 215 Spadina Avenue in the City of Toronto. When the company's designer left in early 1977, Fruitman and Birken sought out Patrick Antonacci to replace him.

4. The second witness, Patrick Antonacci, has been involved in the clothing business since the late 1940's. He has worked his way up through the business. In the early 1960's, by which time he had risen to cutting room foreman, he had the opportunity to become an assistant designer. He took that opportunity, along with a consequent fifty per cent cut in pay. He worked hard, learned the work of a designer, and was securely employed as a designer with another manufacturer when in February or March of 1977 he was approached by Sid Birken. Birken offered him employment as British Brand's designer. Antonacci turned that offer down. Birken came back with an offer which included the opportunity to purchase a ten per cent interest in British Brand. Antonacci accepted, borrowed funds, purchased the shares offered, and became British Brand's designer as well as a director and shareholder.

5. When Antonacci joined British Brand, it had over one hundred production employees engaged in both "manufacturing" and "contract" or "cut, make and trim" work. "Manufacturing" was described as involving production of clothing from fabric purchased by the manufacturer directly from the mill; in a "cut, make and trim" operation, on the other hand, the contractor fills each retailer's order by producing clothing from fabric supplied by that dealer. In 1977, production was evenly divided between manufacturing and "cut, make and trim" or contract work. At the peak of its business in 1979, British Brand supplied forty to fifty clothing retailers; sixty-five to seventy percent of its sales were made in this wholesale market, the balance were made through the company's retail showroom. The fabrics used in British Brand's manufacturing operation were of extremely high quality; suits made of similar fabrics today would retail for \$850.00 to \$900.00. The market for expensive men's suits was sharply curtailed by the recession of 1980-81. British Brand's production volume was significantly reduced, particularly in manufacturing. By late 1983, British Brand had only 19 production workers, and ninety-five per cent of the remaining production was contract work for dealers. By that time, British Brand still had on hand fabric with a book value of a half million dollars, most of which had been purchased during 1980. With total production down considerably, British Brand was left with excess production capacity and reduced sales. In 1982, Birken, Fruitman and Antonacci all took a 60% cut in the salaries they drew from the company. In 1982 and again in the summer of 1983, British Brand sold items of equipment it was no longer using in what was left of its production operation.

6. As of the summer of 1983, the retail part of British Brand's operation was doing well, but the production part still was not. The lease of its Spadina Avenue premises was due to expire April 30, 1984. Birken and Fruitman had lost interest in continuing the production operation;

over the course of the summer and early fall, they resolved to dispose of that operation, continue in the retail trade selling custom made suits, and contract out the production of those suits. The process by which and time at which this decision was made are both a bit unclear; if there was ever any coherent plan as to how British Brand would go about disposing of its production operation and facilities, it is equally unclear what that plan was from time to time. There was no evidence of any systematic effort to attract purchasers for the operation or any of the assets used in it: no evidence of advertising, oral or written, of any sort, and no evidence of listing for sale with any broker or agent of any kind. However, at some point after the decision had been made, Antonacci had discussions with a business acquaintance, Sid Frohman. Frohman and an unnamed associate from Montreal were interested in joining with Antonacci in forming a new corporation to purchase British Brand's production facilities. Antonacci would be a one-third shareholder and continue in charge of design, production and quality control for the new entity. Although arrangements were made for Frohman and the man from Montreal to meet with Birken and Fruitman, the plan fell apart in mid-November before that meeting took place, for reasons which were never revealed to Antonacci. Antonacci faced some hard choices. He had been offered work in Quebec, but did not wish to move his family. Frohman had urged him to cease working for others and go out on his own, and had offered his support in such a venture. Antonacci discussed this with his family, who were supportive. He approached clothing dealers who were still wholesale customers of British Brand, to find out whether they would deal with him if he set up a contract operation. Those dealers said that if he was going to continue to make the same type of garment, he could count them in. He discussed the idea with Fruitman, who said the plan looked good for Antonacci, although he would not do it himself. Antonacci testified, when explaining Fruitman's unfamiliarity with the term "cut, make and trim", that Fruitman was not a "clothing man"; Antonacci was the clothing man at British Brand, that aspect revolved around him. Production was all Antonacci knew; he wanted to stay in it.

7. Antonacci retained Mr. Frohman's lawyer, who caused the respondent Antonacci Clothes Inc. to be incorporated. Antonacci made a list of all the production equipment still in use at British Brand, then spoke to manufacturers of such equipment to find out the fair market value of used equipment of that type. He secured Fruitman's agreement to sell him the listed equipment at the prices he had established. He also secured Frohman's agreement that British Brand would use Antonacci's new company exclusively for a period of one year for the manufacture of all custom garments sold by British Brand. Antonacci's lawyer reduced these agreements to writing on a legal stationer's form of Offer to Purchase, by which Antonacci Clothes Inc. agreed to purchase:

"all the goods, chattels, fixtures and equipment of the business carried on by the Vendor, situated at 215 Spadina Avenue, Toronto, as listed in Schedule "A" (three pages) hereto annexed . . . at the price or sum of . . . \$46,100.00 as follows: . . . \$100.00 . . . as a deposit and . . . \$13,730.00 . . . to the Vendor on closing . . . and for the balance of the purchase price to give back to the Vendor a Chattel Mortgage bearing no interest and running for a term of one (1) [sic] from the date of closing with the privilege of repaying [sic] the principal sum secured by the said chattel mortgage in whole or in part at any time or times without notice or bonus.

The document went on to provide:

In consideration of the Purchaser entering into this agreement, and condi-

tional upon the Purchaser completing the transaction, the Vendor covenants and agrees to use the Purchaser exclusively for a period of one (1) year from the date of closing for the manufacture of all garments custom [sic] sold by the vendor during the said one (1) year period.

This document is dated December 20, 1983, and executed by Mr. Antonacci on behalf of Antonacci Clothes; the acceptance is executed by Carl Fruitman on behalf of British Brand. The evidence did not establish when the instructions were given to incorporate the new corporation, nor, if different, when the instructions were given to prepare this offer, nor when Fruitman signed the acceptance. Although nothing turns on it, it is interesting that the standard form employed for this transaction has printed on it at the bottom of the front page a note, in italics, which reads, in part:

NOTE: Reference should be made to Section 55 of The Labour Relations Act re employees' contracts, . . .

The form is labelled "Revised April 1976"; the section of the *Labour Relations Act* then numbered 55 is now numbered 63.

8. The agreement formed by British Brands' acceptance of the Antonacci Clothes offer provided for a closing date of February 15, 1984. Antonacci also executed a written resignation as a director of British Brand, effective February 15, 1984. He explained that this date was selected because his bank loan was not to be effective until February 1, 1984. British Brand ceased production at the end of January, 1984. Antonacci then took possession of British Brand's production equipment, and moved it to new premises at 75 Horner Avenue. Antonacci Clothes Inc. commenced operations at that address on February 6, 1984. In addition to the equipment set out in the written agreement, Antonacci or his company also purchased British Brand's findings: the buttons, thread, tapes, canvas, pocketing and lining on hand. Antonacci paid \$5,200.00 for the findings; he testified that this is less than he would have paid had he purchased these materials new, and more than British Brand would have received had it sold them piecemeal. Antonacci also purchased or obtained from British Brand two desks, two typewriters and six filing cabinets. The evidence did not reveal what was paid for this office furniture. Antonacci also took with him the patterns he had used when he worked at British Brand. Antonacci conceded that patterns are very important in the clothing industry, and that a designer guards and tries to keep these to himself as far as possible. Antonacci claimed, however, that patterns were his property. Apart from the purchases from British Brand, Antonacci Clothes' only other major start-up expenses were for moving and installing the equipment, as well as the necessary electrical services and other leasehold improvements, in the premises at 75 Horner Avenue.

9. British Brand's employees were given notice of termination at the beginning of December, 1984. At some time in December, Antonacci met with the employees and explained to them that he was going into the contracting business. He told them he required people to work for him, if nothing was available to them through the union they could come and see him, and he would use them. A number did come to work for Antonacci Clothes. In addition to Antonacci's wife and son, Antonacci Clothes had seven employees when it commenced production on February 6, 1984. Five of these had come from British Brand; one, its new working foreman, had been working foreman at British Brand. By April 2nd, the initial work force of seven had grown to 25 employees, fifteen of whom had been employed at British Brand in December. We do not understand our colleague's reference in his dissent to these employees

having been hired "in the open employment market". The only evidence we have before us is that former British Brand employees came to Antonacci at various times, but all in response to the invitation Antonacci extended at the meeting referred to earlier. As noted earlier, British Brand had had only 19 employees when it ceased production. Antonacci Clothes includes in its list of customers all the retailers with which British Brand was dealing before it ceased production. It also lists new customers Antonacci has solicited.

10. After these transactions, British Brand was left with its name, a large quantity of fabric, its contract with Antonacci Clothes Inc., the premises on which its lease was about to expire, and miscellaneous items of little consequence. In mid April, 1984, British Brand itself moved to new premises at 3328 Yonge Street, from which it now sells the custom suits Antonacci has contracted to supply. British Brand plans to sell off its inventory of fabric. The British Brand name or label had previously appeared only on suits it sold in its retail showroom and on model suits it used to promote its manufacturing and contract operations. Suits sold to dealers seldom, if ever, had a British Brand label; they normally had the dealer's label sewn into them. It is not surprising, then, that the name remained with the retail operation. It seems that Antonacci's name also had value to British Brand's continuing retail operation. Fruitman testified that retail customers who have asked have been told that British Brand still has a tie with Antonacci in that he manufactures suits for the company.

11. The Board heard evidence concerning the union's reaction to the discontinuance of British Brand's production operation, its communications with the employees it represented in those operations, its awareness of Antonacci's plans and its communications with Antonacci prior to the filing of these applications March 14, 1984. Mr. Matraia, the third and last witness heard by the Board, is the manager of the Toronto Joint Board of the applicant. He and Mr. Antonacci are well acquainted with one another; in addition to all of his other responsibilities, Antonacci was the member of British Brand's management who dealt with its day-to-day labour relations matters. Matraia met with British Brand employees at the lunch hour on January 12, 1984, having learned earlier of British Brand's decision to terminate the employees and to cease production. The main purpose of the meeting was to discuss with employees the benefits available to them in these circumstances, and have them sign documentation in that connection. The employees told Mr. Matraia of their meeting with Mr. Antonacci and his invitation to apply for work with him. With respect to that invitation, Matraia told the employees that they would have to go on a waiting list for "union" jobs; if they could not wait, they could do what they wished. There was no suggestion that Antonacci's new operation would be a "union" employer. Matraia's secretary had attempted to contact Antonacci prior to the January 12th meeting with employees. A message was left for Antonacci, but it was not returned. Matraia called again later. His evidence is that he got through to Antonacci, had a discussion about why the earlier call had not been returned, told Antonacci that he had heard British Brand was closing and that Antonacci would be "moving out", and suggested it would be advisable for them to get together to discuss "the matter". According to Matraia, Antonacci agreed to get back to him the following week and set a date for such a meeting, but later failed to do so. Antonacci does not recall any telephone conversation with Matraia. He admits he was aware Matraia wanted to hear from him. He did not contact Matraia because he felt it was up to Matraia to contact him. Matraia and Antonacci are agreed that until Antonacci received the notice of hearing in these proceedings, the union had given Antonacci no notice that it claimed bargaining rights for the employees of Antonacci Clothes.

12. At the conclusion of the evidence, the applicant withdrew its claim for relief under subsection 1(4) of the Act. This left at issue the question whether there had been a sale of

business from British Brand to Antonacci Clothes and, if so, whether the Board should direct a representation vote as requested by counsel for Antonacci Clothes.

II

13. The effect of section 63 of the *Labour Relations Act* was described in *Vaunclair Meats Limited*, [1981] OLRB Rep. May 581, in the following terms:

22. When a business or part of a business is transferred or disposed of, the transferee acquires it subject to the collective bargaining obligations of the transferor. A union holding bargaining rights for the employees of the transferor retains those bargaining rights for the employees in a "like unit" to that which existed prior to the transfer, and the transferee must continue to apply the collective agreement to that unit until the Board otherwise declares. This transfer and continuation of bargaining rights happens automatically upon the sale of all, or part, of the transferor's business. The Board may terminate the union's bargaining rights if the successor employer significantly alters the character of the business or part of a business acquired; however, until the Board otherwise declares, the transferee stands in the shoes of his predecessor with respect to established bargaining obligations. In this sense, a union's bargaining rights are in the nature of a vested right, which, by statute, "runs with the business".

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24. The Board has always recognized that the meaning to be attached to the word "business" depends to a great extent upon the facts and circumstances in each particular case. It cannot be said that any one facet of an enterprise taken by itself comprises the "business". The business is the "totality of the undertaking", including: the physical assets, tools and equipment, management and operating personnel, goodwill, and other intangibles. (See *Raymond Cote*, [1968] OLRB Rep. March 1211.) Thus, in determining whether it is the "business" which has been transferred, the Board has frequently found it useful to consider the extent to which these various elements of the predecessor's business organization have been transferred into the hands of the alleged successor; that is, whether there has been an apparent "continuation of all, or part, of the business — albeit with a change in the nominal owner." Many of these factors which the Board considers were summarized in *Culverhouse Foods Limited*, [1976] OLRB Rep. Nov. 691 (application for judicial review dismissed):

"In each case the decisive question is whether or not there is a continuation of the business . . . the factors which might assist the Board in its analysis; among other possibilities the presence or absence of the sale or actual transfer of goodwill, a logo or trademark, customer lists, accounts receivable, existing contracts, inventory, covenants not to compete, covenants to maintain a good name until closing or any other obligations to assist the successor in being able to effectively carry on the business may fruitfully be considered by the Board in deciding

whether there is a continuation of the business. Additionally, the Board has found it helpful to look at whether or not a number of the same employees have continued to work for the successor and whether or not they are performing the same skills. The existence or non-existence of a hiatus in production as well as the service or lack of service of the customers of the predecessor have also been given weight. No list of significant considerations, however, could ever be complete; the number of variables with potential relevance is endless. It is of utmost importance to emphasize, however, that none of these possible considerations enjoys an independent life of its own; none will necessarily decide the matter. Each carries significance only to the extent that it aids the Board in deciding whether the nature of the business after the transfer is the same as it was before, i.e. whether there has been a continuation of the business.

The issue before the Board, of course, remains whether there has been a "transfer of a business" or "part of a business"; but it is much easier to make that finding, and to conclude that the collective bargaining relationship should be continued, if there is substantial continuity of the other elements of the predecessor's business organization. If the elements formerly used by "A" to carry on business are now in the hands of "B", and are used for the same business purposes, it is difficult to resist the conclusion that there has been some form of transfer "of a business" from "A" to "B". (See also: the remarks of Widgery J. In *Kenmir v. Frizzel et al* [1968] 1 All ER 414 — a case arising out of legislation similar to section 55 [now 63].)

25. Most of the cases under section 55 involve an alleged sale of a business in its totality. Only a few consider the meaning to be ascribed to the words "part of a business". Yet those words pose much more difficulty than the term business itself. Almost anything actually traceable to the predecessor could be regarded as "part" of its business, but it cannot have been intended that every minor disposition of surplus assets should give rise to a successorship. To accept this view, would make section 55 the vehicle for extending rather than preserving bargaining rights. Again, the issue must be considered in the factual context of each case and the Board has found a transfer of "part of a business" where one of a chain of retail stores has been sold to a competitor (*Loblaws Grocerterias Limited*, [1973] OLRB Rep. Jan. 72; *More Grocerteria Limited*, *supra*); where there was a transfer of certain milk delivery routes in a particular geographic area (*Borden Company Limited*, [1970] OLRB Rep. Jan. 1244); where there was a transfer of the oil burner and installation service of a firm which was primarily engaged in the sale and delivery of fuel oil. (*Automatic Fuels Limited*, [1972] OLRB Rep. May 515); and where a slaughter house, which was formerly part of a much larger integrated meat packing company, was transferred to a new owner, (*Beef Terminal*, [1980] OLRB Rep. Aug. 1167). In *Central Native Fisherman's Co-Operative el al*, [1977] 1 Can. LRBR 329, the British Columbia Relations Board found that there had been a transfer of a "part of a business" when a cannery which was formerly part of a much larger business organization was sold to a fisherman's co-operative.



The Board referred to *Canac Shock Absorbers* [1973] OLRB Rep. Oct. 508 and *Alcan Building Products Limited*, [1968] OLRB Rep. May 213, and continued:

28. In each of the cases to which we have referred, the Board found that the predecessor had transferred a coherent and severable part of its economic organization managerial or employee skills, plant, equipment, “knowhow” or goodwill, — thereby allowing the successor to perform a definable part of the economic functions formerly performed by the predecessor. This economic organization undertook activities which gave rise to employment, and the terms and conditions of employment, together with the union’s right to bargain about them, were preserved. The part of the predecessor’s business which it no longer wished to continue, provided the business opportunity which the successor was able to pursue to its own advantage. In all of the cases, there was a transfer of a distinct part of the predecessor’s configuration of assets, and no material change in the character of the work performed by employees within that asset framework. There was a continuation of the work performed, the essential attributes of the employment relationship, the skills of employees, and the functional coherence of at least a part of the employee complement; and but for section 55, the established bargaining and collective agreement rights would have been lost. This was the very mischief to which section 55 is directed, and the Board was satisfied on the evidence in each case that it should be applied.

14. In giving his evidence, Mr. Antonacci spoke as though this application were concerned with whether what he had done was “wrong”. He and his counsel emphasized his good relations with the applicant over the years, and protested that the transactions in question were not intended to undermine the applicant’s rights. We are all satisfied there is no evidence that the respondents, or their principals, instituted any of these transactions for the purpose of avoiding collective bargaining with the applicant. That finding does not resolve the issue. Section 63 is not an “unfair labour practice” provision. While it provides protection against schemes adopted for the sole or primary purpose of avoiding established bargaining rights (see, for example, *Carroll Electric*, [1982] OLRB Rep. Dec. 1814), it is also intended to preserve bargaining rights from the incidental dislocating effects of genuine commercial transactions undertaken for reasons which have nothing to do with any desire to frustrate the collective bargaining rights of employees and their bargaining agent: see, *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1193 at ¶ 26; and, *Aircraft Metal Specialists Limited*, [1970] OLRB Rep. Sept. 702 at ¶¶ 5 and 6. The question at hand is not whether any of the respondents intended to disrupt the applicant’s bargaining rights, nor whether they intended that their transactions amount to a “sale of business” in the sense intended by section 63 or in any commercial sense. The question is whether their transactions amount, in all the circumstances, to a “sale of business” within the meaning of section 63. The intentions of the participants are relevant only to the extent that they assist in assessing the nature of the transactions themselves.

15. As counsel for both parties noted, the Board’s decisions under section 63 and its predecessors are numerous, each ultimately turns on its own facts, and none establishes a comprehensive, unfailing litmus test for the presence or absence of a sale of business. Counsel for the respondent Antonacci Clothes cited in argument *Marvel Jewellery*, [1975] OLRB Rep. Sept. 733, *Shiffer-Hillman Clothes*, [1983] OLRB Rep. May. 764; *Braneida Mechanical*

Service Ltd., [1981] OLRB Rep. Aug. 1102; *L. Davis Textiles Co. Limited*, [1982] OLRB Rep. May 664 and *Bermay Corporation Limited*, [1979] OLRB Rep. July 608. Counsel for the applicant referred also to *Tatham Company Limited*, [1980] OLRB Rep. March 366; *Vaunclair Meats Limited*, *supra*, and the cases referred to in the above-quoted passage from that case, *Dellelce Construction*, [1972] OLRB Rep. Jan. 60, and *Metropolitan Parking Inc.*, *supra*. The applicant submits that contract production work was a coherent and severable part of British Brand's business, and was therefore a "business" capable of being the subject of a sale within the meaning of section 63 of the Act. The applicant argues that Antonacci Clothes acquired all of the essential elements of that business and thereby acquired the business itself. Antonacci Clothes argues that British Brand's production business had effectively ceased to exist when the transactions in question occurred, that the transactions in issue transferred only assets surplus to British Brand's continuing requirements, and that the life-force of Antonacci Clothes came not from British Brand but from the accumulated expertise, knowledge and contacts of Patrick Antonacci. Counsel for Antonacci Clothes relied heavily on the fact that his client acquired neither the British Brand name nor the location at which British Brand had formerly operated.

16. One very important element common to Antonacci Clothes and the production part of British Brand's business is Patrick Antonacci. He dealt with the day-to-day employee relations at British Brand; according to the evidence, he did the hiring for Antonacci Clothes. He designed British Brand's suits; he designs Antonacci Clothes' suits. He supervised production at British Brand; it appears he supervises production at Antonacci Clothes. He was in charge of quality control at British Brand; there is no evidence that anyone other than Antonacci deals with quality control at Antonacci Clothes. No matter who owned them at the time, the patterns Antonacci took with him are the patterns that were used at British Brand when Antonacci was there. They were in use or available for use at British Brand until Antonacci left. They are in use, or available for use, at Antonacci Clothes.

17. Patrick Antonacci is not the only element common to the alleged predecessor and successor businesses. The production equipment in use at Antonacci Clothes is the core equipment British Brand still needed and used as it continued production on a scale much reduced from that of the late 70's. Many of the employees who operate this equipment operated that equipment for British Brand. Those employees are now supervised by two working foremen; one was the working foreman at British Brand, and the other is a former British Brand employee. What they do with the equipment is make suits similar to the suits formerly made at British Brand. Antonacci Clothes sought out and serves many of British Brand's former wholesale customers. Antonacci Clothes is the exclusive supplier for British Brand's retail operation, as was the alleged predecessor operation when it formed part of British Brand.

18. While we agree with counsel for the respondent that the case for a sale of business would be stronger if the successor had retained the predecessor's name and location, the fact that those elements were not transferred does not seriously detract from the effect of the substantial congruence of other features of the predecessor and successor. Counsel for Antonacci Clothes argued that the Board's decision in *Shiffer-Hillman Clothes*, *supra*, assigned great weight to location and name in assessing sale of business in the clothing industry. As in this case, the alleged predecessor business in *Shiffer-Hillman Clothes* manufactured clothing which it then sold in an on-site retail showroom. The predecessor had been put in receivership by its bankers. The receiver auctioned off most of the predecessor's equipment and machinery, and sold to the public most of its inventory of finished clothing. The successor purchased what remained: the name, left-over clothing inventory, clothing patterns and miscellaneous left-over

equipment. By means not made clear in the decision, the successor was able to lease a portion of the premises formerly leased and occupied by the predecessor. The successor contracted out the manufacture of suits using the patterns formerly employed by the predecessor, and entered into the retail sale of that clothing under the predecessor's name. In the circumstances of that case, the Board found that there had been a sale of business through the receiver from the predecessor to the successor. The decision illustrates that the retail part of a retail/wholesale operation can also be the subject of a sale of business, and that name and location are important elements of the retail part of such a business. We are not dealing with that part of the business here. There was no evidence before us to suggest that the business of a wholesaler is in any significant way dependent on its location. As to the name, the evidence suggests that wholesale customers were more concerned with the design and the identity of the designer than they were with the name of the owner of its clothing supplier. The former matters would affect the quality of suits and hence the retailer's ability to sell them. Because its name did not appear on the predecessor's products when sold by other retailers, it is difficult to see how a change of name unaccompanied by any change in designer or production management could make a significant difference in the wholesale market.

19. As for the absence of any transfer from British Brand to Antonacci Clothes of accounts receivable, customer list, "goodwill" and the like, the following passages from *Winiker Industrial Auctioneers Ltd.*, [1978] OLRB Rep. Jan. 15, are particularly apt:

9. In support of his contention that there has not been a continuation of the business of Radio by the respondent, counsel placed stress upon the fact that there has not been a sale of goodwill. The absence of goodwill in the sale is evidence, counsel says, that there has not been a section 55 disposition. The presence of goodwill in a transaction is often an important indicator that a sale, or other disposition, within the meaning of section 55, has occurred. It is not necessary, however, that there be a transfer of goodwill in order to find a section 55 disposition. The presence or absence of goodwill in a transaction is only significant to the extent it helps to resolve the more fundamental question of whether or not there has been a continuation of the business (see *Culverhouse*, *supra*; *Hughes Boatworks Inc.*, Board File No. 0655-77-R, December 1977; and *Zehrs Markets Limited*, [1974] OLRB Rep. May 331.

11. The evidence in this case is that the business has continued to operate after the sale, and that it has continued to operate in virtually the same manner as before. The same products are being produced, by the same employees, using the same production facilities and equipment. Although there was no purchase of accounts receivable, customer lists the other intangibles normally embraced by the term goodwill, the evidence is that the business has continued to serve the same customers, although it would appear that it is presently serving fewer. . . . In the circumstances, the absence of a transfer of goodwill cannot negate the conclusion that the transaction in question has resulted in a continuation of the business, particularly in view of the respondent's knowledge and familiarity with the audio products markets. To the extent that goodwill existed at the time of the sale, it would appear that the respondent had no need of such goodwill in order to continue the business as a going concern.

In the case before us, the goodwill associated with British Brand's production operation was in no small part personal to Patrick Antonacci; in the circumstances, he would not have needed a formal transfer from British Brand in order to exploit that goodwill, particularly given the firm decision of the other shareholders that British Brand would not continue in clothing production in any way.

20. With respect to Antonacci's approaches to British Brand's customers and his success in acquiring them as customers of Antonacci's Clothes, counsel submitted that this was the result of Antonacci's personal efforts with people whom, for the most part, he knew before joining British Brand, and not the result of something done for him or transferred to him by British Brand. It cannot be overlooked, however, that Antonacci was an officer, director and shareholder of British Brand at the time he approached these customers. They would be used to dealing with him as a representative of British Brand. They expressed to him a continuing desire for the type of garment they had been able to purchase from British Brand. These were not competitive approaches; Antonacci was not asking British Brand's customers to leave it and go with him. It would have been quite inconsistent with his fiduciary duties to British Brand for Antonacci to promote a competing business while still engaged as a senior officer and director of British Brand. However, British Brand was going to leave the market; Antonacci planned to enter it as British Brand left, and with British Brand's blessing. That was the context of and for Antonacci's approaches to British Brand's customers. He was not leaving British Brand to compete with it. British Brand was leaving him free to stay in clothing production. The only competition on the scene was just what had always been there: British Brand's competitors. Neither the approaches to customers nor their success is a negative or neutral factor in assessing whether what has occurred here constitutes a sale of business; in our view they are indicia that a sale has occurred, and in that regard we adopt the analysis at paragraph 12 of the Board's decision in *Big Bear Storage*, [1979] OLRB Rep. March 164:

12. Unless the predecessor's customers are tied to contracts which can be assigned, it falls to the successor to cultivate and maintain these customers. An attempt by a purchaser to gain access to i.e. through customer lists or cultivate the predecessor's customers is an indicia of the successor's intent to operate the predecessor's business. Conversely, if the alleged successor fails to cultivate or serve the predecessor's customers as in *re Dufferin Steel*, (supra), the Board may view this failure as supportive of the conclusion that there has not been a continuation of the predecessor's business. The decision by Mr. Young to gain assurances from the largest customer of the predecessor that it would leave its stored goods at 1290 Bendale Road if he operated a warehouse business from the premises and the decision of Starkist and many of the other customers of the predecessor to do business with Big Bear supports the conclusion that there has been a continuation of the predecessor's business. The fact that he gained these assurances on his own initiative and possibly as a result of his personal reputation in no way supports the conclusion that there has not been a sale of a business.

21. Counsel for the respondent Antonacci Clothes argued that there was no "business" for British Brand to sell by the time the transactions in question occurred. The production side of the business had been losing money for some time, the decision to cease production had already been made, the only potential sale of that part of the business as a going concern had fallen through, and the employees had been given notice. When put in the balance with all the other facts and circumstances of this case, these factors cannot be given much weight. The

fact that the owner of a business is in financial difficulty at the time of an alleged sale has never been fatal to the argument that a "sale of business" has occurred. Any number of Board decisions have held that dispositions by trustees in bankruptcy, court appointed receiver-managers, and receiver-managers appointed by instrument can constitute a sale of business: see, for example, *Marvel Jewellery Ltd.*, [1975] OLRB Rep. Sept. 733; *Hughes Boat Works Inc.*, [1977] OLRB Rep. Dec. 815 (application for judicial review dismissed at (1980) 26 O.R. (2d) 420); *Winiker Industrial Auctioneers Ltd.*, *supra*; *Big Bear Storage*, *supra*; and *Shiffer-Hillman Clothes*, *supra*. In each of these cases the financial difficulties of the owner had led the trustee or receiver to engage in transactions which, as the Board found in each case, resulted in a sale of business. In *Marvel Jewellery Limited*, for example, the receiver continued to operate the business while attempting to sell it as a going concern. After having no success, the receiver ceased operations, terminated the employees and closed the plant. The transaction ultimately found to be a sale of business was first proposed to the receiver only after all these events had occurred. Here, of course, there was no receiver. The decision to dispose of the production aspects of the business was a voluntary one; it could be given effect at a pace more leisurely than would be found in a receivership situation. It was a decision with which Antonacci was not happy, but he had no real control over it. It would have been clear that Antonacci would prefer to continue in production; it would have been clear also that the value of British Brand's production operation would be highly dependent on whether Antonacci continued to be associated with it. This undoubtedly explains why there is no evidence that anyone other than Antonacci was actively involved on British Brand's behalf in the attempt to dispose of the production operation, nor evidence of any prospective transaction which did not involve Antonacci in some way.

22. In all the circumstances, we conclude that there was a sale of business from British Brand Clothes Limited to Antonacci Clothes Inc.

III

23. The respondent Antonacci Clothes argued that if the Board found that there had been a sale, it should order a representation vote pursuant to section 63(8) of the Act. Its counsel noted that there were among his client's employees persons who had not been employees of British Brand and might not, therefore, favour representation by the union which had represented the employees of British Brand. Counsel suggested that the Board's decision in *Bermay Corporation Limited*, *supra*, was authority for the exercise of the Board's discretion to order a representation vote when a substantial number of the employees of a successor employer were not formerly employed by the predecessor. With respect to the remaining employees who had formerly been employed by British Brand, counsel suggested the evidence had established that they thought they were entering non-union employment when they applied to work for Antonacci Clothes. Some emphasis was also placed on the fact that the union had not earlier alerted Antonacci to the position it now takes.

24. Subsections 2 and 3 of section 63 of the Act are concerned with preserving a trade union's right to represent employees in a bargaining unit when there is a change in the real or nominal ownership of the business in which those employees are engaged. When the employees in the bargaining unit for which the trade union has bargaining rights are not covered by a collective agreement at the time of the change in ownership of the business in which they are engaged, subsection 3 provides that the trade union continues to be the bargaining agent for employees of the successor "... in the like bargaining unit in that business ...". Where

the subject employees are covered by a collective agreement at the time of the sale, subsection 2 provides that the successor is "bound by the collective agreement as if he had been a party thereto . . .". These words have been interpreted by the Board in a manner consistent with the language of subsection 3; the scope clause in the predecessor's collective agreement is not applied literally to all the employees of the successor after the sale, but only to those of its employees who are at that time engaged in the sold business: *The Bryant Press Limited*, [1972] OLRB Rep. Apr. 301. The rights preserved are not just the right to represent the particular persons who fell within the bargaining unit at the time of the sale. The scheme of the *Labour Relations Act* is that trade unions acquire, by certification or voluntary recognition, the exclusive right to bargain on behalf of and represent employees in a defined bargaining unit. Those bargaining rights are not limited to the particular employees who may have fallen within the bargaining unit description at the time those rights were first acquired. Bargaining rights cover all those who, at any given time, fall within the reach of the bargaining unit definition. An employer's work force may expand or contract, new employees may be hired and old ones depart; while these events may change the number and identity of employees for whom the trade union has bargaining rights, the bargaining rights themselves remain unaffected. While a trade union's right to represent employees in a particular bargaining unit is initially determined by the wishes of the employees in the bargaining unit at the time of the determination, the union's status as exclusive bargaining agent is not continuously exposed to reappraisal of the desires of the employees who may from time to time thereafter find themselves within that bargaining unit. The occasions on which such a reappraisal may occur are circumscribed by the "timeliness" provisions of sections 5, 57, 59, 61 and 123 of the Act. Nothing in subsection 2 or subsection 3 of section 63 renders timely a reassessment of representation rights which would have been untimely had a sale not occurred. Indeed, section 63(10) makes untimely some representation applications which would have been timely but for the intervening sale of business: see *Don Hemmelskamp*, [1979] OLRB Rep. Feb. 99 at ¶14.

25. Section 63 contemplates that a finding that a sale of business has occurred, and the resulting application of either subsection 2 or subsection 3 of the section, may not resolve all the labour relations issues which can result from a sale of business. Subsections 4 and 6 specifically address the complications which can arise when a successor employer is already engaged in a business at the time of the sale which is the subject of the application. Subsection 4 empowers the Board to resolve certain questions of definition which can arise in these circumstances, in order to preserve appropriately the boundaries of the "like unit" in respect of which subsection 2 or 3 has operated to preserve a trade union's bargaining rights. Subsection 6 recognizes that labour relations realities may make ineffective or undesirable the attempt to maintain those boundaries. As the Board observed in the *Essex County Board of Education*, [1969] OLRB Rep. July 552:

4. The purpose of section [63(6)] is to avoid that confusion which arises where employees represented by one trade union as their bargaining agent are intermingled with other employees who may or may not be represented by a bargaining agent. Hence, intermingling, whether it is factual or deemed by operation of section [63(11)], is a condition precedent to bringing an application under section [63(6)]. Once that condition is satisfied the Board then may exercise its powers under section [63(6)] and section [63(8)]. Intermingling then becomes one of the factors which the Board considers in determining an appropriate bargaining unit under section [63(6)(b)].

The exercise of the Board's power under subsection (6)(b) may result in

one or more new bargaining units containing elements of the bargaining unit for which rights are preserved by subsection 2 or 3 as well as elements of an actual or inchoate bargaining unit of employees engaged in the business in which the successor was engaged prior to the sale. This redefinition of bargaining units will raise a representation issue which is not resolved simply by asking whether a sale of business has occurred and then determining the description of the bargaining unit affected by the sale. The remaining provisions of subsection 6 of section 63 empower the Board to resolve that representation issue and deal with the consequences of that resolution. In *Alliance Dairy Limited*, [1966] OLRB Rep. Aug. 336, the Board noted that it will not in every such case be necessary to conduct a representation vote in order to resolve this issue of representation:

5. The purpose of section 47A is, subject to the provisions set out in the section, to continue the bargaining rights of a trade union which had represented employees in a bargaining unit where the employer has sold his business. Bargaining rights thus are protected in the interest of stability in collective bargaining relationships. Where two or more bargaining units are, as the result of a sale and the intermingling of employees, merged into one, as in the instant case, both the need for stability in collective bargaining relationships and plain common sense would require that, where there is a large disparity in the size of the two groups of employees, there would be no representation vote, with its necessary expense, propaganda and disruption, but rather a declaration should be made that the trade union representing the great majority of the employees is to be bargaining agent for the new bargaining unit.

When two or more bargaining units are merged by the Board in the exercise of its powers under subsection 63(6), a substantial disparity in their relative sizes has been dispositive of the question of the resulting question of representation not only where persons employed by the successor prior to the sale were represented, as in *Alliance Dairy*, but also where one of the intermingled groups was not previously represented: *Town of Iroquois Falls*, [1969] OLRB Feb. 1208. Where disparity in size is not determinative of the issue of representation, the Board has exercised its power under subsection 63(8) to direct a representation vote in order to assist the Board in resolving the issue of representation created by the redefinition of bargaining units.

26. On its face, section 63(8) gives the Board an unfettered discretion to direct a representation vote in the course of disposing of an application under section 63 of the Act; however, there are some logical limitations on the exercise of that discretion. A representation vote is intended and designed to determine representation issues. The existence of a sale of business settles the question of representation dealt with by subsections (2) and (3); a representation vote is of no assistance in determining whether a sale has occurred (see *Vaunclair Meats Limited*, *supra*, at ¶33) and the mere existence of a sale does not raise or make timely a reappraisal of representation rights. As we have noted, however, a representation issue may arise if there is resort to the Board's powers under section 63(6). That is what happened in *Bermay Corporation Limited*, *supra*.

27. In *Bermay Corporation Limited*, the Board found that the respondent Bermay, a furniture manufacturer, was the successor of Goldcrest Furniture Limited, another furniture manufacturer, as a result of transactions which the Board found amounted to a sale of business.

Before the sale, Bermay had employed in its business 26 unorganized employees; Goldcrest had employed over 70 employees represented by the trade union applicant in that case. In the course of the sale, Bermay hired 24 of Goldcrest's former employees, moved its pre-existing business and employees into Goldcrest's premises, and hired twenty "new employees" not previously employed by either company. After finding that there had been a sale of business, the Board went on to say:

17. That finding, however, does not dispose of the matter. In this case the respondent has some 70 production employees, 24 of whom were represented for collective bargaining purposes by the applicant under the predecessor employer. While Section 55 of the Act operates to protect the bargaining rights of those employees and their union it also provides a mechanism to balance their interest with the interest of the respondent's former employees and new employees who work side by side with them. Section 55(6) of The Labour Relations Act provides as follows:

"(6) Notwithstanding subsections 2 and 3, where a business was sold to a person who carries on more other businesses and a trade union or council of trade unions is the bargaining agent of the employees in any of the businesses and such person intermingles the employees of one of the businesses with those of another of the businesses, the Board may, upon the application of any person, trade union or council of trade unions concerned.

- (a) declare that the person to whom the business was sold is no longer bound by the collective agreement referred to in subsection 2.
- (b) determine whether the employees concerned constitute one or more appropriate bargaining units;
- (c) declare which trade union, trade unions or council of trade unions, if any, shall be the bargaining agent or agents for the employees in such unit or units: and
- (d) amend, to such extent as the Board considers necessary, any certificate issued to any trade union or council of trade unions or any bargaining unit defined in any collective agreement."

18. An obvious concern in the resolution of the conflict that arises upon the intermingling of employees who have previously been organized with employees who were previously not organized is the interest of the employer to have its industrial relations conducted within the framework of a rational bargaining structure. In this case, the Board is satisfied that it would be contrary to the interests of the employer and of the employees as a group to segregate the former employees of Goldcrest into a vestigial bargaining unit that would exclude all other production employees. It would, in our view, be equally inappropriate to effectively grant the bargaining rights for the two third of the production employees who have not previously been organized to the applicant without any indication of the wishes of that majority group. The Board is therefore satisfied that it should in these

circumstances describe the appropriate bargaining unit and exercise its discretion under section 55(8) of *The Labour Relations Act* to conduct a representation vote among all of the employees in the bargaining unit.

We do not understand the quoted references to “new employees” as suggesting that the Board will order a representation vote whenever a successor employer hires, at or shortly after the time of a sale, persons who were not previously employed by the predecessor employer. The “new employees” referred to by the Board in *Bermay Corporation Limited* were employees hired simultaneously with the consolidation by Bermay of its existing furniture business with the business it purchased from Goldcrest and the consequent intermingling of Bermay’s former employees with employees formerly employed by Goldcrest. The Board’s resort in *Bermay Corporation Limited* to its powers under section 63(6) did not depend on the presence or absence of “new employees”, but on the intermingling of employees identified with the two pre-existing bargaining units. It may not have been possible, and in any event was not necessary, for the Board to determine whether the “new employees” represented an accretion to one or other or both of those pre-existing bargaining units. The important fact was that the merger of businesses had made it necessary to redefine bargaining units and, as a result, bargaining rights; it was that exercise, and not the hiring of “new employees”, which created the representation issue to which the Board responded by ordering a representation vote.

28. In this case, the respondent Antonacci Clothes came into existence for the purpose of engaging in the transaction which we have found constituted a sale of business within the meaning of section 63. The only business in which this respondent has engaged is the business it purchased from British Brand. All its employees can therefore be described as falling within the “like” bargaining unit in respect of which the applicant’s bargaining rights are preserved by our finding that there has been a sale of business. If one disregards the change in ownership of the business in question, the situation here is this: a small number of the employees employed in the business prior to February 1st are no longer employed in it, and another, larger, number have since been hired to work in the business. Those circumstances would not normally give rise to a question of representation, unless it were a question raised in a timely manner by the employees themselves. The fact that some employees are new to the unit is of no more consequence than it would have been had the ownership of this business remained unchanged. The change of ownership does not change that result where, as here, the sale of business has not itself created circumstances which give rise to a question of representation.

29. Counsel for Antonacci Clothes was unable to cite, and we have been unable to find, any decision in which the Board ordered a representation vote pursuant to subsection 63(8) otherwise than to resolve an issue raised under subsection (6) as a result of intermingling which had occurred or, by virtue of subsection (11), was deemed to have occurred. Although we doubt that resort to a representation vote under subsection 63(8) is appropriate in any other circumstances, we need not decide that here. We find that the employment by Antonacci Clothes of persons not previously employed by the predecessor British Brand does not warrant the direction of a representation vote, and that follows as much from our conclusion that to do so would be inconsistent with the general scheme of the Act as from the fact that subsection 63(6) has not been and could not be applied to these circumstances. The respondent also based its request on the fact that the applicant had not told Antonacci or the British Brand employees that by operation of law it would have bargaining rights with respect to any production employees of Antonacci Clothes. We observe that those employees had notice of this application and none opposed it on any ground. As for Antonacci, he can hardly complain about what the union did not say on a subject he avoided discussing with it. We observe also that each alleged “failure”

to opine or assert rights occurred *before* the sale transaction took place. No matter how broad the discretion to order a vote under subsection 63(8) may be, these would not be proper grounds on which to exercise that discretion. The permanence of the bargaining rights protected by section 63 should not depend on anticipatory assertion of them prior to a sale. In short, none of the circumstances of this case warrant our directing a representation vote.

IV

30. In the result, the Board declares that British Brand Clothes Limited has sold part of its business to Antonacci Clothes Inc., and that the applicant has the right to represent employees of the respondent Antonacci Clothes Inc., pursuant to section 63(3) of the *Labour Relations Act*.

DECISION OF BOARD MEMBER F. C. BURNET;

1. I dissent from the opinion of my colleagues on the Board.

2. The majority notes in its extensive review of the jurisprudence that no single test or combination of tests exists to determine whether a sale of a business has occurred, although several factors have been identified as being pertinent to such determination. These include such matters as the transfer of goodwill, customer lists, brand names, existing contracts, equipment, premises, the fact or not of hiatus etc. None of these are controlling, and each carries significance only to the extent that it indicates whether there has been a continuation of a business.

3. Superseding all these tests is the simple central issue whether implicitly or explicitly, there were negotiations or an understanding of any nature leading to the transfer of the business as an operating entity, (whether viable or not), for financial or other considerations.

4. In this case, the answer is clearly negative. British Brand had taken a decision to wind up the business, not to sell it, and the reason was clear. Earlier attempts to sell the business had elicited only one inquiry and that had not developed. In short, the business was losing money and was not saleable as an operating entity. It had failed and the only remaining values lay in the intrinsic value of certain physical assets. Most customer accounts had been lost, employment had declined from over 100 to 19, and these were given notice of termination in December 1983. Much equipment that had become surplus to requirements through the recession had been sold off, and the balance was made available for disposal. Purchase of fabrics had long since ceased and existing inventories of fabrics and related supplies were being worked off. Clearly, the business was dead and hence not saleable.

5. In an attempt to secure his own livelihood in the face of impending lay-off, Mr. Antonacci, the key employee in British Brand's manufacturing operation and the sole repository of the design and technical know-how, chose to risk starting up his own operation. The company he formed was totally distinct from and corporately unrelated to British Brand. He purchased his basic equipment and some supplies from British Brand for the sensible reason that he could buy it more advantageously from the defunct company than he could through equipment and material suppliers; he did not acquire the building lease but rented other quarters. He did not acquire customer lists or contracts, since British Brand had none which they could dispose of in any sale. British Brand did not solicit any former customers on his behalf. He did not acquire

any goodwill (none remained), nor did he acquire any trademarks, or accounts receivable or other assets. Neither did he assume any liability for accounts payable or other debts. I distinguish the case of *Winniker Industrial Auctioneers Ltd.*, [1978] OLRB Rep. Jan. 15, upon which the majority in this case rely in respect to the issue of customer lists, goodwill and the like. The Winniker business had continued to operate; British Brand manufacturing had not. Winniker products were the same; Antonacci products were the same only in the generic sense of being mens suits, — but made to whatever specifications the customer demanded. Winniker products were produced by the same employees; Antonacci products were produced by some former British Brand's employees who had been terminated and were hired in the open employment market as needed and in competition with other applicants.

6. Mr. Antonacci did hire a few former employees of British Brand and added to them as he became established, not as a part of any contractual obligation or other commitment as is commonly the case when a business is sold as a going concern. The former employees of British Brand came, as did others, as new employees of a new company. He hired them simply because he wanted experienced help and they had been unable to secure other employment through the union or their own efforts.

7. He did secure business from former customers of British Brand but only through ordinary competitive marketing efforts and not from the purchase of contracts or any other efforts on his behalf from British Brand. His sole assistance from British Brand in this respect was a short term contract (one year) to supply the needs of their retail trade — a reasonable arrangement considering the amicable relationship between him and his former employer and their interest in the success of his enterprise in view of the fact that he purchased some of the equipment from them on time. I do not attach the same significance as the majority has in its paragraph 20 to the fact that Antonacci was an officer of British Brand when he solicited business from former British Brand's customers — first, because Antonacci was a very nominal officer indeed. He had no title as such, and no duties beyond those of his salaried position as designer. He never attended Board meetings, as there apparently were none and he apparently took no part in decisions, beyond those of his designer job. Second, these approaches to potential customers were very much normal competitive approaches — not competitive against British Brand, for it was effectively dead (in manufacturing) and had no customers — but against all other manufacturers in the business.

8. Finally, it is significant that Mr. Matraia, the manager of the union, testifies to a long and amicable relationship with Mr. Antonacci, and more particularly, that the decision of British Brand to close its manufacturing operation, and the start up of Antonacci Clothing was in no way a ploy to frustrate the bargaining rights of the union the employees.

9. In all these circumstances, I would find that British Brand did not sell or dispose of its manufacturing operation to Antonacci Clothing, and I would dismiss the application.

10. However, given the decision of the majority that a sale occurred I do not dissent from the decision to deny a representation vote.

0508-84-R William Baziuk & Doris Baziuk, Applicant, v. United Steel Workers of America, Respondent

Practice and Procedure — Termination — Union ceasing negotiations after appointment of conciliation officer — Subsequent termination application filed under section 59 untimely — Company ceasing operations and laying-off all employees — Discontinuation of bargaining not reason to terminate bargaining rights

BEFORE: Ian C. Springate, Vice-Chairman, and Board Members J. Wilson and C. A. Ballentine.

APPEARANCES: *William Baziuk and M. W. Baziuk for the applicant; Keith Oleksiuk and Henry G. Gareau for the respondent.*

DECISION OF IAN C. SPRINGATE, VICE-CHAIRMAN, AND BOARD MEMBER C. A. BALLENTINE; July 31, 1984

1. This is an application for a declaration terminating bargaining rights. The application itself does not refer to any particular section of the *Labour Relations Act*. However, in a letter to the Board dated April 30, 1984 counsel for the applicants indicated that the application was being filed under section 59 of the Act.

2. Section 59 of the Act provides as follows:

“59.-(1) If a trade union fails to give the employer notice (i.e. notice to bargain) under section 14 within sixty days following certification or if it fails to give notice under section 53 and no such notice is given by the employer, the Board may, upon the application of the employer or of any of the employees in the bargaining unit, and with or without a representation vote, declare that the trade union no longer represents the employees in the bargaining unit.

(2) Where a trade union that has given notice under section 14 or section 53 or that has received notice under section 53 fails to commence to bargain within sixty days from the giving of the notice or, after having commenced to bargain but before the Minister has appointed a conciliation officer or mediator, allows a period of sixty days to elapse during which it has sought to bargain, the Board may, upon the application of the employer or of any of the employees in the bargaining unit and with or without a representation vote, declare that the trade union no longer represents the employees in the bargaining unit.”

3. No evidence was led before the Board. However, at the hearing the representative of the applicants set out certain facts relevant to the applicants' business activities which were not challenged by the representative of the respondent. By the same measure, the representative of the respondent trade union set out certain facts relating to the status of the union's bargaining rights which were not challenged by the representative of the applicant. From the statements of the parties it appears to be common ground that the applicants, William and Doris Baziuk, were at one time involved with the operations of an incorporated company known as Great

Lakes Rail Limited. This company was engaged in the fabrication of iron, steel and metal products at a shop located in the City of Thunder Bay. The two applicants are also connected with a construction company in Thunder Bay. The respondent trade union, however, has no bargaining rights with respect to this company and its operations are in no way affected by these proceedings.

4. In April of 1979 the respondent trade union was certified as the bargaining agent for certain employees of Great Lakes Rail Limited. In 1980 the company entered into a collective agreement with the union which was to expire on January 16, 1982. On or about October 22, 1981 the union served on the company a notice to bargain for a renewal agreement, and on October 28, 1981 forwarded certain proposals to the company. On December 29, 1981 the Minister of Labour appointed a conciliation officer to assist the parties to negotiate a new collective agreement. No such agreement was ever concluded, however. Due to certain financial problems, in early March, 1982 the company ceased operations and laid off all of its employees. In these circumstances the trade union made no attempt to continue bargaining. At the hearing, the representative of the union stated that it was only a lack of any employees within the bargaining unit which caused the union to cease trying to negotiate a collective agreement.

5. The financial problems of Great Lakes Rail Limited came to a head in March of 1982 when the Bank of Montreal laid claim to the firm's inventory and receivables. Following this, the two applicants, William and Doris Baziuk in their personal capacities, took possession of certain of the assets of the company. At the hearing, the representative of the applicants contended that the company is now "dead" and that it would be appropriate to terminate the union's bargaining rights so that the applicants can dispose of assets formerly used by Great Lakes Rail Limited, free of any union connection.

6. The position of the respondent trade union is essentially two-fold. Firstly, the respondent contends that this application is not properly brought under section 59 of the Act. Secondly, it submits that the termination of its bargaining rights would be inappropriate since in the event of a sale the purchaser might, in fact, prove to be a successor employer of Great Lakes Rail Limited.

7. We are satisfied that this application is not properly brought under the provisions of section 59. Section 59 applies where a trade union has failed to serve notice to bargain or having done so, but before the Minister has appointed a conciliation officer, allows sixty days to elapse in which it has not sought to bargain. Here the union did serve notice to bargain and did engage in bargaining up until the time that a conciliation officer was appointed. This fact by itself is sufficient to dispose of this application. We would note, however, that even if the lay-off of employees and the cessation of bargaining had occurred prior to the appointment of a conciliation officer, such that an application under section 59 would have been timely, nevertheless we would not be prepared to exercise our discretion under that section to terminate the union's bargaining rights. Section 59 is meant to ensure that a trade union that represents a unit of employees actively seeks to forward the interests of those employees and does not "sleep on its rights". In the instant case, so long as there were employees in the bargaining unit the union actively sought to bargain on their behalf. Once all of the employees were laid off it was not unreasonable for the union to cease its activities in this regard since they might prove to be of no useful purpose. The lack of employees in a bargaining unit, however, does not necessarily mean that the bargaining rights themselves are meaningless. For example, it is not unknown for a company that has halted operations and laid off its employees to later call back the employees and resume operations. In such a situation it is quite appropriate for

the union that represents the employees to recommence negotiating on their behalf. We would note that in the instant case there is no guarantee that if the union's bargaining rights were to be terminated the business of Great Lakes Rail Limited might not later be revived.

8. The applicants contend that the business of Great Lakes Rail Limited is in fact "dead", and that they wish to sell off some of the company's assets free of any union connection. If it is the case that the business of Great Lakes Rail Limited no longer exists, then any sale of the assets would not, in fact, involve the trade union. If, on the other hand, a sale actually involves all or part of the business of Great Lakes Rail Limited, then the union's bargaining rights would continue, and the union would be entitled to bargain for a new collective agreement with the purchaser. The relevant provisions of the Act with respect to the sale of all or part of a business provide as follows:

"63.-(1) In this section,

(a) "business" includes a part or parts thereof;

(b) "sells" includes leases, transfers and any other manner of disposition, and "sold" and "sale" have corresponding meanings.

• • •

(3) Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or has given or is entitled to give notice under section 14 or 53, sells his business, the trade union, or council of trade unions continues, until the Board otherwise declares, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement or the renewal, with or without modifications, of the agreement then in operation and such notice has the same effect as a notice under section 14 or 53, as the case requires.

• • •

(8) Before disposing of any application under this section, the Board may make such inquiry, may require the production of such evidence and the doing of such things, or may hold such representation votes, as it considers appropriate.

(9) Where an application is made under this section, an employer is not required, notwithstanding that a notice has been given by a trade union or council of trade unions, to bargain with that trade union or council of trade unions concerning the employees to whom the application relates until the Board has disposed of the application and has declared which trade union or council of trade unions, if any, has the right to bargain with the employer on behalf of the employees concerned in the application.

• • •

(12) Where, on any application under this section or in any other proceeding before the Board, a question arises as to whether a business has been sold by one employer to another, the Board shall determine the question and its decision thereon is final and conclusive for the purposes of the Act."

9. The Act indicates that the issue of whether there has been a sale of all or part of a business (as opposed to merely a sale of assets) is to be decided after the sale has occurred. Indeed, only then does one know for certain what has been sold, and how what has been sold is to be used by the purchaser. Other factors would also be relevant to a finding as to whether or not a sale of a business has occurred, including the facts surrounding the cessation of operations, the lay-off of all the employees and the length of time that no actual operations were being carried on. The decision as to what weight is to be given to these and any other relevant considerations, however, must await a full hearing before the Board when and if an application is actually made pursuant to section 63.

10. Having regard to the foregoing, we are satisfied that this is not a proper case in which to terminate the respondent's bargaining rights. In consequence, the application is hereby dismissed.

11. The decision of Board Member J. Wilson will be forthcoming at a later date.

2668-83-U Felix Charles, Complainant, v. Canadian Union of United Brewery, Flour, Cereal, Soft Drink & Distillery Workers, Local 304, Respondent

Duty of Fair Representation — Unfair Labour Practice — Collective agreement amended to permit lay-off where work available less than five loads per day — Core group of senior employees protected from lay-off — Union exempting core group from tonnage maximums imposed on other unit employees — Whether manner of negotiations objectively justified — Discrimination on tonnage maximums held unlawful

BEFORE: Robert D. Howe, Acting Chairman.

APPEARANCES: *Romain W. M. Pitt for the complainant; John McNamee for the respondent.*

DECISION OF THE BOARD; July 25, 1984

1. This is a complaint under section 89 of the *Labour Relations Act* in which the complainant alleges that he has been dealt with by the respondent (also referred to in this decision as the "Union") contrary to section 68 of the Act. In particular, the complainant contends that the Union breached section 68 by entering into a collective agreement which contained certain layoff and truck capacity provisions which are alleged to be arbitrary or discriminatory.

3. In addition to his client, counsel for the complainant called as witnesses two other bargaining unit employees, Veira Mitchell and Victor Clark. The sole witness called by the respondent in these proceedings was Cameron Nelson, a lawyer who has been the respondent's elected business agent since March of 1978. The findings of fact contained in this decision are based upon my assessment of the relative credibility and reliability of the evidence given by those witnesses, having regard to such factors as the firmness of their respective memories, their ability to resist the influence of self-interest in giving their evidence, their recollections, the consistency of their evidence, their capacity to express their recollections clearly, and their demeanour. Although many of the facts are not in dispute, there are a number of conflicts between the testimony of the complainant and the testimony of Mr. Nelson. In resolving those conflicts, I have generally relied upon the evidence of Mr. Nelson, whom I found to be a candid and credible witness, rather than the evidence of the complainant, who gave contradictory evidence on a number of matters, displayed significant memory lapses, and gave portions of his testimony in such a manner as to raise serious questions concerning its accuracy and reliability. For example, the complainant initially testified that he attended the January 26, 1984 Union proposal meeting and objected to the provisions which form the subject matter of this complaint. However, under vigorous cross-examination by counsel for the respondent, he ultimately conceded that he left at or near the start of that meeting, and did not voice any opposition to the provisions in question at that time or at any other time prior to filing this complaint.

4. The complainant has been a dependent contractor tandem truck owner-operator in the employ of Dufferin Aggregates (also referred to in this decision as the "Company") since 1974. In July of 1978 the Union was certified as bargaining agent for the Company's dependent contractor owner-operators of tandem trucks. In the fall of 1978, the Union and the Company entered into their first collective agreement in respect of that unit. In negotiating that agreement, the Union concentrated on improving haulage rates and monetary conditions, and placed only secondary emphasis on job security. By the spring of 1980 when the Union was attempting to negotiate its second collective agreement with the Company, the situation had changed dramatically. Since the total amount of bargaining unit work had declined substantially, the major issue in those negotiations was job security. Since one of the reasons for that decline was the Company's increased use of independent trucking contractors operating tractor trailer units (larger than the tandem trucks operated by bargaining unit members), the Union attempted to negotiate a provision under which bargaining unit members would be guaranteed a certain percentage of the stone shipped from the quarry, or a minimum of five loads per day. It also attempted to negotiate language that would permit bargaining unit members to purchase tractor trailers for use in performing bargaining unit work. However, the Company refused to agree to any of those proposals despite a nine-week strike, which was largely unsuccessful due to the fact that the tractor trailers continued to haul loads from the pit during the strike.

5. At the time of certification there were 45 persons in the bargaining unit. However, by the end of the strike that number had fallen to 34. Article 4 of the (June 18, 1980 to December 31, 1981) collective agreement that was entered into following that strike provided for the establishment of a "drivers' list based on seniority", the number of drivers on which was not to exceed 34. Article 4 further provided as follows:

4.02 There shall be no layoff during the life of this Agreement, it being understood that the drivers will share available work in accordance with present practice.

During the term of that collective agreement, a continuing decline in bargaining unit work gave rise to pressure from members to reopen the collective agreement and revise it so as to permit the Company to lay off drivers. As a result, on August 14, 1981 the Union and the Company agreed to delete Article 4.02 as set forth above, and to substitute the following provision:

Should the Company find it necessary to lay-off members of the bargaining unit due to lack of work, it shall do so in reverse order of seniority. During periods of lay-off, the Company shall maintain a lay-off list of drivers and shall recall them in order of seniority when work becomes available. Recalls shall be effected by telephone call and, if necessary, by telegram or registered letter sent to the driver's last known address. The Company will also advise the Union when it intends to lay-off or recall a driver.

Almost immediately after that amendment had been ratified, the Company laid off a number of bargaining unit members, thereby reducing its bargaining unit work force to twenty drivers. In May or June of 1982, there were further layoffs which reduced the bargaining unit to sixteen drivers. Among the drivers laid off by the Company was the complainant, who in May of 1981 had purchased for approximately \$90,000 a new truck with a capacity of about 27 tons. The complainant's payments on that truck exceed \$1,700 per month. He also pays additional amounts for fuel, tires, repairs, insurance, and licence fees.

6. The Union's mid-contract negotiation of a layoff provision in substitution for the aforementioned work-sharing provision gave rise to a section 68 complaint by five members of the bargaining unit who were adversely affected by it. (The present complainant was not one of those five persons.) That complaint (File No. 1373-81-U) was dismissed by the Board, differently constituted, in a decision dated January 18, 1982 (reported in [1982] OLRB Rep. Jan. 35). Since the parties to the instant complaint are in agreement that the principles set forth in that decision are also applicable in the present case, it is appropriate to quote from the Board's reasoning in that decision at some length:

17. Allocating work and wages, whether in scarcity or in plenty, is the central fact in any scheme of collective bargaining. The struggle between union and management over the division of profits in the form of wage and benefits settlements usually gets the bulk of public attention. The less visible question, however, of which employees will work and how much they will get is often no less important. It may generate as much heat inside the union hall as does the confrontation with the employer outside. That kind of internal union tension stands in high relief in the facts of this case.

18. There are those who maintain that it is inconsistent with the duty of a trade union to fairly represent individual employees for the union to take steps that will prejudice employees' vital job interests, including their job security. That view has generally been associated with the argument for an absolute right of individuals to have access to arbitration for such serious consequences as the loss of their employment. (See, e.g. Blumrosen, *Legal Protections for Critical Job Interest: Union Management Authority Versus Employee Autonomy* (1959), 13 Rutgers L. Rev. 631.)

19. The fact, however, that a union may be required in bargaining to make a hard decision that has a serious economic impact on individuals,

up to and including the loss of their jobs, cannot of itself make that decision unlawful. That kind of decision is, moreover, not unusual. In making collective agreements it is practically impossible for unions to avoid making decisions that benefit one class of employees at the expense of another. For example when a union opts for more wages rather than better pension provisions it benefits its younger members rather than the older ones. Trade-offs of that kind are the everyday stuff of collective bargaining.

20. Under the *Labour Relations Act* such decisions are lawful so long as they are not arbitrary, discriminatory or in bad faith within the meaning of section 68 of the Act. In the knowledge that unions are commonly required to make hard decisions affecting their members, those words have been deliberately chosen by the Legislature to avoid undue interference in the internal affairs of trade unions. The Board's powers of review over union actions under the section go only to matters of representation, when the quality of representation falls below the limited threefold standard set out in section 68. The issue in these proceedings, therefore, is whether the union's decision to re-open the contract and effectively allow junior employees to be laid off was arbitrary, discriminatory or in bad faith.

21. There is nothing inherently unlawful in a union making a decision that favours a group of employees over another. From the earliest decisions interpreting section 68 of the Act the Board has recognized the need for unions to have the latitude to make decisions that may favour certain employees at the expense of others. As the Board put it in *Ford Motor Co. of Canada Ltd.* [1973] OLRB Rep. Oct. 519, in applying what was then section 60 of the Act (at pp. 525-26):

In practical terms the relationship between members of the bargaining unit and the trade union is one of majority control. The relationship is not strictly one of contract between employee members of the union and the union, but rather the relationship is such that the system created more closely resembles the Legislative process than a contractual relationship; see Cox, *Rights Under a Collective Agreement*, 69 Harv. L. Rev. 601 (1956).

Section 60 of *The Labour Relations Act* seeks to ensure that individual's rights are not abused by the majority of the bargaining unit; it is an attempt to achieve a balance between the individual interests and the majority interest by recognizing that the exclusive bargaining agent has a duty to consider all the separate interests in the performance of its obligations. The duty has been described as the duty of fair representation. The emphasis is on fairness — it is a duty to act fairly in the interests of all members of the bargaining unit, minority factions, as well as majority factions, individual employees, as well as the collective group, members as well as non-members, craft employees as well as industrial employees. It is not a duty which makes the union the guarantor or insurer for every situation in which an individual employee is aggrieved or adversely affected; rather, the statute attempts to have the union

consider the position of all groups and to weigh the competing interests of minorities, individuals and other like groups in arriving at its decision.

22. In this case the complainants ask the Board to conclude that the decision to effectively eliminate the jobs of a minority is in itself a violation of the duty to fairly represent the members of the minority. Counsel for the complainants argues that the grievors had a contractual right and expectation to work out of the quarry over the life of the collective agreement and that to re-open the contract to undo that right is a violation of their vested rights inconsistent with the duty of fair representation.

23. As compelling as that argument may seem, in my view it does not assist the understanding of the issue to simply assert that the members of a minority have an absolute right to be protected against negative consequences to their job security. The collective agreement is a contract made between the employer and the union. They are the parties to it, and any benefits which it confers on individual employees are necessarily subject to the possibility of amendment between the parties. In this regard it should be recalled that a collective agreement is not "a bundle of individual contracts between employer and employee negotiated by the union as agent for the employees". (*Syndicat Catholique des Employes de Magasins de Quebec, Inc. v. Compagnie Paquet Ltee*, [1959] S.C.R. 205; (1959), 18 D.L.R. (2d) 346; *McGavin Toastmaster Ltd. v. Ainscough* (1975), 54 D.L.R. (3d) 1 (S.C.C.))

24. That is not to say that a trade union can with impunity disregard the interests of the employees it represents or take either a hostile or an indifferent attitude where employees' critical interests are at stake. In discharging its duty to fairly represent all of the employees in a bargaining unit a union must address its mind to the circumstances of those who may be adversely affected by its decision. It has a duty to weigh the competing interests of the employees it represents and make a considered judgment the procedure and results of which must be neither arbitrary, discriminatory nor in bad faith.

25. Counsel for the complainants submits that in this case the union has not properly balanced the interests of the two groups of employees involved. He argues that if the union cannot show that the marginal advantage which the union's decision gives the majority outweighs the disadvantage to the minority, it has violated the duty of fair representation. In other words, he maintains that the union must justify its decision, and absent such justification the Board should conclude that the union's action is in violation of the duty of fair representation.

26. The submission must be considered with great caution. To adopt that standard in an unqualified way risks placing the Board in the position of being the arbiter of the political correctness of a union decision. The weighing of competing interests and the ultimate choice as to which outcome is preferable is a highly subjective decision, inevitably influenced by the inherent values, viewpoints and preferences of the decision maker. In the

collective bargaining context such choices are highly political, and to that extent unions are required to act as responsive political bodies.

27. In bargaining changes that affect the competing interests of employees a union has a two stage involvement: firstly it must be the forum for resolving the conflict between sometimes irreconcilable employee interests; secondly it must act as the spokesman for the interests that carry the day. Once the internal choice is made the union must approach the employer with the force and conviction of a body with a single voice. To view the union in this later stage as the antagonist of the minority is to misconceive the process. Professor Cox, in discussing the processing of grievances, usefully summarized this dimension of union activity as follows:

When the interests of several groups conflict, or future needs run contrary to present desires, or when the individual's claim endangers group interests, the union's function is to resolve the competition by reaching an accommodation or striking a balance. The process is political. It involves a melange of power, numerical strength, mutual aid, reason, prejudice, and emotion. Limits must be placed on the authority of the group, but within the zone of fairness and rationality this method of self-government probably works better than the edicts of any outside arbiter. A large part of the daily grist of union business is resolving differences among employees poorly camouflaged as disputes with the employer.

(Cox, "*Rights Under a Labour Agreement*", (1956) 69 Harv. L. Rev. 601 at 626-27.)

28. The weight of authority supports the view put forward by counsel for the complainants that special considerations attach to any decision by a union that alters or abrogates the job security of employees. That is especially true in relation to seniority rights. Seniority rights, built up over time, usually over a number of successive collective agreements, represent an employee's stake in critical interests such as promotion, pension rights and his rights of layoff and recall. The concept of seniority comes as close as any to approximating a form of industrial relations property right for the individual employee and its consideration by labour boards in fair representation complaints is particularly instructive.

29. The special consideration attaching to decisions affecting seniority in assessing the duty of fair representation was expressed as follows by the B.C. Labour Relations Board in *B.C. Distillery Company Limited*, [1978] 1 Can. L.R.B.R. 375 at 381:

... The fact of the matter is that existing seniority clauses take on a much more compelling hue than other contract clauses. This is a good statement of the reasons why:

... Seniority enables an employee to acquire valuable interests by his work, to capitalize his labour and obtain something more than

a day's wages for his continued production. When seniority determines promotion rights, it gives the employee a claim to better jobs when they become available; when seniority determines the order of layoff, it provides the employee a measure of insurance against unemployment. Seniority does not guarantee that vacancies in higher rated jobs will be filled or that any jobs will be available; but by giving the senior employee priority when a choice is made as to who will be promoted or who will remain employed, seniority gives an employee an interest of substantial practical value. As Professor Aaron has pointed out, more than any other provision of the collective agreement, . . . seniority affects the economic security of the individual covered by its terms, and it has understandably come to be viewed as one of the most highly prized possessions of any employee. Seniority may be the most valuable capital asset of an employee of long service.

Summers and Love, *Work Sharing as an Alternative to Layoffs by Seniority*, (1976) 124 U. of Pa. L.R. 893, at p. 902.

Employees in the plant know their position on the seniority list. They believe that they have earned the spot by their long service. They have firm expectations that that position will remain unaltered. Suppose then that the union and the employer negotiate a change in that clause, one which has the effect of re-shuffling positions on the seniority list. How does the adversely affected employee naturally perceive that contract change? He believes that the parties have simply taken a valuable asset belonging to him and given it to another employee. That perspective is most dramatic in a layoff situation in which the total number of jobs in the plant is being reduced:

In a layoff situation, however, seniority takes on an importance of a wholly different order, for it determines who shall continue to work and who shall not. That determination necessarily carries with it all the other employment rights ordered by seniority — overtime, shift preferences, promotions, and the rest. In addition, layoff may jeopardize or destroy other valuable rights attached to employment or accumulated by long service. Layoff may result in termination of group medical or life insurance which the employee cannot afford to continue individually. If the layoff continues long enough to terminate seniority the employee may lose the longer vacations, accumulated sick leave, longevity pay, and perhaps even pension benefits earned by length of service. When employees are confronted with mass layoffs, the symbolic and real importance of seniority is most compelling; deviation from the order of seniority is viewed as repudiation of 'vested right'. It deprives the senior employee not only of his security but of all other values he has earned by his length of service.

Summers and Love, pp. 904-905.

And for these pragmatic reasons, the law simply cannot take the attitude that because the union and the employer freely negotiated the original seniority clauses, they are also able to change that existing clause at will. As Professor Archibald Cox said: "*When established seniority rights are changed the bargaining representative should be required to show some practical justification beyond the desire of the majority to share the job opportunities theretofore enjoyed by a smaller group*" (Cox, *The Duty of Fair Representation* (1957), 2 Villanova L.R. 151 at p. 64.)

[Emphasis added]

30. This case involves the elimination of a work sharing guarantee in favour of a provision of layoffs by seniority. A work sharing provision is one of a number of means, like seniority, like provisions prohibiting the contracting out of bargaining unit work, or like classification schemes, whereby job security can be directly affected. It is obviously a fundamental provision in any collective agreement, expressing as it does the choice and expectation of the employees respecting the allocation of work in times of scarcity. Commonly associated with the garment industry, work sharing represents a choice made by employees that in the event of hard times they will share the shrinking volume of work available rather than sever some employees from their jobs for the benefit of the remainder. That approach is readily understandable among dependent contractors who, like the complainants, operate with substantial capital investments in markets that fluctuate both with the economy and with the seasons. A hauler is arguably less secure if he is subject to layoff and recall at the discretion of this employer than if he has a contractual guarantee of a place in the quarry.

31. Work sharing has deep and abiding importance for the employees who are under it. Because it impacts on job security it represents an employee interest just as critical as a seniority provision. Action by a union to change or eradicate a work sharing or no-layoff provision must, therefore, be viewed seriously and be judged by the same standards as a change in seniority provisions. That is particularly so where, as here, employees have had the security and benefit of such a provision through successive collective agreements. The impact in this case is more dramatic still: as dependent contractors the complainants do not contribute to the Unemployment Insurance scheme. For them the consequences of a layoff are particularly hard, and the analogy to a change in seniority ranking provisions is extremely close. The decisions of the courts and labour boards on the relationship between seniority and the duty of fair representation therefore deserve close analysis.

....

34. The Board agrees with the view expressed by Professor Cox that a union transferring the job opportunities of a minority to a majority must be required to show some objective justification beyond the majority will. Predatory practices are not justified simply because they are implemented by a vote of the majority. To so conclude would be to eliminate any real

protection to minorities, a result clearly inconsistent with the very origins of the duty of fair representation (*Steele v. Louisville and Nashville Railroad Company* (1944), 15 L.R.R.M. 708 (U.S.S. Ct.)).

35. More recent U.S. decisions have, like the decision of the B.C. Board in the *B.C. Distillery* case, *supra*, stressed that when a majority transfers to itself employment advantages previously enjoyed by the minority it must show some objective justification beyond the mere will of the majority. The case of *Barton Brands Ltd. v. NLRB* (1976) 529 F 2d 793; 91 LRRM 2241 (U.S. C.A. 7th Circuit) is an example. In the wake of the closing of one plant and the merger of two companies the union negotiated to alter seniority rights and entail the seniority lists. Employees had initially voted for dovetailing when it was believed that a new plant would open. The union's entailing negotiations began when it learned that the plan to open a new facility had been abandoned. The Court held that seniority rights, once established, cannot be expropriated simply for the benefit of the majority (at L.R.R.M. 2246):

In summary, since the established seniority rights of a minority of the Barton employees have been abridged by the 1972 collective bargaining agreement for no apparent reason other than political expediency, there seems to be sufficient grounds in this case to support the Board order. . .in order to be absolved of liability the Union must show some *objective justification* for its conduct beyond that of placating the desires of the majority of the unit employees at the expense of the minority.

(emphasis added).

....

36. In this case a majority of the union has transferred to itself work opportunities previously enjoyed by a minority. The issue then becomes whether the evidence discloses an objective justification for the union's action.

37. The Board must obviously use great care in assessing what is and what is not objective justification for a union's decision, particularly a decision relating to choices as to the allocation of goods in conditions of scarcity. In my view it would be clearly inappropriate for the Board to substitute its own view for the union's by simply asking itself whether it would have acted differently. To do that is to substitute one subjective standard for another, and not to consider the issue of objective justification. The appropriate standard to be adopted by this Board is not unlike that expressed by the Court in the judicial review of the decisions of arbitrators: the Board should ask not whether the decision is right or wrong or whether it agrees with it — rather it should ask whether it is a decision that could reasonably be made in all of the circumstances, even if the Board might itself be inclined to disagree with it. Used in this sense "reasonable" must

mean by the rational application of relevant factors, after considering and balancing all legitimate interests and without regard to extraneous factors.

....

41. This was a crisis decision — like a decision about how to determine who will survive in an overcrowded lifeboat. If the union had decided to transfer work from the minority to the majority in a time of relative prosperity, where its obvious motive was to increase the already profitable position of some drivers at the expense of others, it would be difficult to avoid the conclusion that its decision was in violation of the duty to provide representation free of invidious favoritism. That is clearly not the situation. I am satisfied on the evidence that continued economic hardship forced the union's members to question and eventually reject the wisdom of the work sharing provision in their collective agreement. For them sharing the work, or more accurately, sharing the lack of it, was no longer a viable means of doing business as dependent contractors.

42. In reaching its decision did the union adequately balance the competing interests of the majority and the minority? In considering that question it is helpful to weigh the relative advantages and disadvantages of work sharing for all of the truckers. For them work sharing was not a guarantee against unemployment. Under the collective agreement as it stood before it was re-opened there was ample scope for attrition in the quarry. The only difference under work sharing as compared to under layoffs by seniority is that as the volume of work diminished attrition would be by order of poverty. Drivers with greater financial obligations would be less able to survive lean periods than those who owned their trucks outright. Under that system, given continual shrinkage, the poor would go first and the rich would go last.

43. The drivers were in a "no win" situation. Absent an upturn in the volume of business (in which case layoffs would not be a problem) someone was going to be hurt by the economic pressure. In these circumstances can the union be faulted for choosing an alternative by which those with the longest investment of service in the quarry should go last? The union was not content with the system which, in effect, gave the shrinking work in the quarry to those with the financial strength to bid for it. It chose instead to let seniority prevail. In asking whether the ultimate decision is one that could be reasonably made I do not see how the union can be faulted for preferring what a particularly helpful study has called a political mode of allocation over a market mode of allocation in a time of scarcity. (See Calabresi and Bobbitt, *Tragic Choices*, New York, 1978, at pp. 31-41).

44. This Board cannot conclude that in the difficult circumstances facing it, the union's decision to alter its system of work allocation was without objective justification. Without ignoring the hardship on the junior employees who were eventually affected by the union's decision, I must conclude that the decision to renegotiate the work sharing provision was one which the union was entitled to make in the circumstances, and that neither the

motive nor the consequences of its decision violated its duty of fair representation. For reasons elaborated above, I am also satisfied that the procedure followed by the union was free of arbitrariness, discrimination or bad faith.

7. In 1983 the Union had another lengthy and difficult set of negotiations with the Company. In spite of the aforementioned layoffs, the amount of work available to the remaining sixteen members of the bargaining unit continued to decline. Thus, the Union's main goal in the 1983 negotiations was to find a way to keep those sixteen owner-operators busy enough to survive. In particular, the Union pressed for a guarantee of 1,000 loads per year per truck. The Company responded by offering much lower guarantees, combined with substantial reductions in rates. Ultimately, the conciliation process was exhausted and a strike was narrowly avoided. Although the collective agreement produced by those negotiations did not include any work guarantee, Company officials advised the Union that they were confident that they could keep the sixteen remaining drivers busy in view of the fact that the Union not only agreed to freeze the rates at their 1982 level, but also agreed that if the Company cut 15 per ton off the price of its product, the Union would match further Company reductions, up to a maximum of 20 per ton. As a result, the Company was able to offer its customers a price reduction of up to 55 per ton. Since the Union and the Company were both of the view that the price reduction would yield sufficient work to keep the sixteen employees who remained in the bargaining unit reasonably busy, they agreed to include in their collective agreement a no layoff provision identical to the original Article 4.02 as quoted above, thereby protecting those sixteen drivers from being laid off during the term of that agreement.

8. The 1983 collective agreement also addressed certain dispatching problems that had been encountered as a result of the variety of sizes of tandem trucks owned and operated by bargaining unit members. Those trucks fell into three categories: small tandems, used to haul loads of about 17 to 21 tons; small tri-axles, used for loads of 22 to 24 tons; and big tri-axles, used for loads of 27 to 30 tons. Those disparate sizes gave rise to a number of tensions among drivers. For example, owners of the larger trucks did not like it when a smaller truck was called out of turn at the request of a customer who wanted a smaller truck to deliver a 20 ton load. Other large truck owners would refuse to take smaller loads destined for residential backyards, since they took too long to deliver. In an effort to resolve some of those problems, the Union and the Company agreed to the following language:

4.03 Drivers will be called by unit, which means that the type and size of vehicle will not be stipulated. However, if the unit is deemed unacceptable by the dispatcher because of size or any other physical reason, that unit must return to the trucking pool and assume a position at the bottom of the list. Undersize loads will be offered to all vehicles in order of call. Any operator refusing an undersize load will then return to the bottom of the list. Underloads will be compensated for at a rate equal to 20 tons or at the legal net weight of the driver and vehicle, whichever is the least.

The variance in truck sizes also caused tension within the bargaining unit because larger truck owners, such as the complainant, could afford to have their rates cut more than owners of the smaller trucks. Thus, persons such as the complainant wanted the Union to negotiate more substantial rate cuts than small truck drivers could afford to take if they were to continue to earn a living. Drivers with smaller trucks, on the other hand, favoured layoffs rather than rate cuts as a means of permitting senior drivers to weather downturns in business.

9. After that collective agreement was signed, the volume of work available to members of the bargaining unit increased substantially due to the Company's "competitive edge" which resulted from the aforementioned price reductions. To the total surprise of Cameron Nelson and the other persons who had been involved in negotiating the 1983 collective agreement, work available to bargaining unit members increased so substantially in November of 1983 that the Company recalled two of the laid off tandem truck drivers that month and three more in December. Thus, the active work force increased beyond the anticipated level of 16 and, as a result of the no layoff clause included in the agreement, could not be reduced when the volume of available work declined.

10. On January 16, 1984 the Union held a meeting in the drivers' shack at the quarry for the purpose of formulating bargaining proposals for the next collective agreement. All of the members of the bargaining unit were notified of this meeting by mail. When some of the senior members of the unit asked Mr. Nelson whether the more junior members who had been recalled from layoff would be permitted to attend, Mr. Nelson indicated that they would. It was Mr. Nelson's uncontradicted evidence that all such persons, including the complainant, had been informed that they were entitled to attend, speak, and vote at that meeting. Although the complainant was in the drivers' shack that afternoon, he left before the meeting commenced at 4:30 p.m. Approximately fourteen members of the bargaining unit attended that meeting, which was chaired by Mr. Nelson. Of those fourteen, thirteen were employees who had never been laid off by the Company. The members who were in attendance at that meeting levelled much criticism at Mr. Nelson for his failure to anticipate that a temporary upswing in work would lead to persons being recalled whom the Company would be unable to lay off again when the work fell off as it always did during the period from January to April. During the course of that meeting, a number of proposals were received from the floor, discussed at length and passed by a majority vote as "proposed amendments" to be put to the Company during the ensuing negotiation, including the following:

Proposal #1 Amend Article 4.02 to provide that "Should the company find it necessary to lay off members of the bargaining unit due to lack of work it shall do so in reverse order of seniority. During periods of lay off, the Company shall maintain a layoff list of drivers and shall recall them in order of seniority when work becomes available. Recalls shall be effected by telephone call and, if necessary, by telegram or registered letter sent to the driver's last known address. The company will also advise the Union when it intends to lay off or recall a driver."

It is understood, however, that the 16 truckers listed in Schedule A attached hereto shall not be subject to layoff during the life of the agreement.

....

Proposal #5 Provide for clarification of the company's needs with respect to the size of trucks needed.

....

11. The Company agreed to proposal #1 during negotiations and it was therefore included in the Memorandum of Agreement signed by the Union and the Company on January 26, 1984, which Memorandum was subsequently ratified by the membership at a meeting which the complainant elected not to attend. The complainant, who was number seventeen on the seniority list, was not included in that protected group of sixteen. The rationale provided by the respondent with respect to the protection from layoff of the sixteen employees with the greatest seniority was that, unlike the other members of the bargaining unit, including the complainant, those sixteen had never been laid off by the Company in the past and, accordingly, properly considered themselves to be a core group of permanent drivers. Mr. Nelson further noted that it was that group of sixteen employees for whom the Company and the Union had attempted in 1983 to negotiate protection from layoff on the basis that the rate reductions which they were prepared to implement would provide adequate work for them. It was also his uncontradicted evidence that sixteen permanent drivers would provide the Company with sufficient flexibility to meet short term fluctuations in demand, and that the membership made that proposal in recognition of the fact that if there were too many trucks for the work available, none of the drivers could make a reasonable living. I also accept his evidence that although the thrust of the Union's proposal was the protection of a specified *number* of employees (sixteen) from layoff, a list of sixteen specific individuals was appended (as Schedule A) because the Union wanted the sixteen to be identified in order of seniority since it was also proposing certain revisions to the loading order, based on seniority. (Those loading order revisions do not form part of this complaint.)

12. As noted above, the disparity of truck sizes had been a continuing source of friction within the bargaining unit. Since the Company had suggested to the Union in previous negotiations that bargaining unit members should be concentrating on smaller trucks rather than trying to compete with (non-union) tractor trailers, the membership decided to seek clarification of the Company's needs in this regard. However, the Union bargaining committee was itself split over the issue of truck size. The chairman of the committee owned a small truck and was unwilling to continue making relatively greater financial sacrifices than the owners of larger trucks. The latter favoured rate reductions but were opposed to limiting their load or truck size. Ultimately, the compromise arrived at was that although drivers could continue to operate trucks with a capacity of more than 24 tons, and could at any time increase the capacity of their trucks to 24 tons, the maximum load to be loaded on any truck would be 24 tons, with the exception that truckers on the aforementioned list of sixteen whose trucks carried more than 24 tons would be allowed to continue to carry their normal tonnage, provided that whenever they replaced their trucks they would be required to reduce the capacity to 24 tons or less. The following language to that effect was included in the Memorandum of Agreement signed by the Union and the Company on January 26, 1984, which was to be effective from January 1, 1984 to December 31, 1984:

Add a new clause 4.03(a) to provide that "with the exception of trucks specified in paragraph 2 of this article the maximum load to be loaded on any truck will be 24 tons. It is understood and agreed that any driver may increase the capacity of their trucks to 24 tons at any time.

Truckers on the list of 16 whose trucks currently carry more than 24 tons will be allowed to continue to carry their normal tonnage provided that whenever they replace their trucks or equipment they will be required to reduce the capacity to 24 tons or less.

13. There is conflicting evidence concerning the number of bargaining unit drivers whose trucks' capacity exceeded 24 tons. Mr. Nelson negotiated the Memorandum of Agreement on the understanding that two of the sixteen (Schedule A) drivers had trucks with a normal tonnage in excess of 24. It was the complainant's evidence, on the other hand, that "five or six" of the sixteen had a tonnage capacity of over 24 and that he was the only other driver who had a truck of that capacity. Veira Mitchell, another bargaining unit member who testified before the Board in these proceedings on behalf of the complainant, stated that about seven of the drivers in the group of sixteen had trucks with a capacity of over 24 tons. Victor Clark, a third member of the bargaining unit who was called to testify by complainant's counsel, estimated that eight or nine of the sixteen had such capacity. Mr. Nelson testified that it was his understanding that there were trucks "outside of the sixteen" that were larger than 24 tons, including the complainant's and the truck owned by G. Kourelakos. (The complainant acknowledged that Mr. Kourelakos had owned such a truck but maintained that he had replaced it with another smaller truck in the summer of 1983.) Although Mr. Nelson assumed that there were more than those two, he conceded that a number of the other large trucks had gone to Florida during the strike and had not returned. The situation is made more complex by the fact that Mr. Nelson was testifying on the basis of how much the trucks were licensed to carry, while the complainant purported to testify on the basis of the weight which the trucks actually carried. Under the circumstances, it is not possible to determine the actual number of trucks involved. However, it is clear that at least two of the sixteen were given the privilege of continuing to carry loads of over 24 tons, which privilege was denied to the complainant by the terms of the Memorandum of Settlement. However, it is questionable whether the complainant has suffered any actual loss as a result of that amendment, since the limitation had apparently not yet been applied to him as of June 4, 1984 (the day on which the complainant concluded his testimony in this matter.) Mr. Nelson sought to justify the truck size language contained in the Memorandum of Agreement on the basis that it was a compromise intended to standardize and minimize divergence in an "attempt to end the inter-group warfare that went on".

14. In addition to a number of provisions which are not in issue in the present proceedings, the January 26, 1984 Memorandum of Agreement also contained the following new clause (4.02(a)):

The company will only recall trucks over the core group of 16 when business requirements necessitate.

After any period of 2 weeks when it becomes apparent that the daily trips for each driver has fallen below 5 loads/day consistently the Company will either lay off surplus trucks or advise the union representatives in the quarry of specific details concerning the upcoming trucking requirements which would indicate that the loads/truck/day would return to the minimum of 5 loads/truck/day within a one week period.

15. With respect to that layoff trigger of five loads per day, Mr. Nelson testified that the bargaining committee "wanted to establish something that was objective, not wholly at the discretion of the Company". It is clear from the evidence that the desirability of a standard of five loads per day had been the subject of frequent discussion among the members of the bargaining unit. Indeed, the complainant himself stated in cross-examination, "We've all been saying that for five years." It is also clear from the evidence that anything less than five loads per day could easily be handled by the sixteen drivers who would not be subject to layoff, as

they were capable of carrying nine or ten loads per day. Mr. Nelson further testified that the level of five loads per day was "the Company's number as well as the Union's number". In response to the complainant's suggestion that a driver who consistently carried five loads per day would become rich, Mr. Nelson advised the Board that there was no realistic expectation that any of the sixteen drivers would consistently attain that level as during the first four months of the year business is always so slow that the amount of work available to each of the sixteen would be far less than five loads per day. Indeed, the evidence indicates that in the first four months of 1982 and 1983, the sixteen drivers in question averaged less than two loads per day. The evidence as a whole, including the evidence adduced by the complainant and the two other witnesses called by counsel for the complainant, supports Mr. Nelson's assertion that although the impugned layoff provision would result in only the protected sixteen persons being at work during the period from January to April, the work available during that slow period "would not be enough to keep them even a third busy".

16. Following ratification of the Memorandum of Agreement, the complainant was laid off by the Company on February 6, 1984. However, he was recalled in May, along with Veira Mitchell (who is number 18 on the seniority list), as a result of the usual seasonal increase in the Company's business.

17. Prior to filing the present complaint, Mr. Charles never at any time raised an objection to the Union's bargaining proposals or the terms of the Memorandum of Settlement that were unanimously ratified by the membership. Mr. Charles attended neither the proposal meeting nor the ratification meeting, and lodged no objections with Mr. Nelson or with any other Union official. Although Mr. Nelson candidly conceded that the complainant's attendance at the proposal meeting would not likely have fundamentally altered the thrust of those proposals, he suggested that it might have "toned down some of the proposals".

18. Having regard to all of the evidence, I am satisfied that the object and effect of the five loads per day layoff trigger, combined with the protection from layoff of the group of sixteen, is to ensure that the limited bargaining unit work that is available will be shared among a group small enough to make it viable over the full course of the year, but large enough to meet some short term fluctuations in demand for the Company's product. In this regard, I accept Mr. Nelson's evidence that the Union was sincerely attempting to negotiate job security provisions that would be fair to all drivers, so that the sixteen permanent drivers who remained would be able to make a reasonable living and those who would be subject to seasonal layoff would know that in advance, and have a reasonable opportunity to seek work elsewhere. As noted above, it was for those sixteen owner-operators that the Company and the Union attempted to negotiate protection from layoff in their 1983 collective agreement, on the basis that the rate reductions which they were prepared to implement would provide adequate work for them. It was not contemplated in those negotiations that demand would increase to such an extent as to necessitate recalls, thereby creating anew the problem of too many employees during the slow period of the year, with no mechanism for layoff. Thus, the evidence as a whole supports Mr. Nelson's assertion that by negotiating those provisions, the Union's bargaining committee was merely enshrining what it thought had already been attained in the preceding collective agreement. Having regard to all of the circumstances, I find that the respondent has shown objective justification for those amendments, within the principles set forth in the *Dufferin Aggregates* case, *supra*. However, no such justification has been shown for the amendment which purports to preclude the complainant from using his existing 27 ton truck to its full capacity (upon being recalled to active employment), while permitting those within the group of sixteen who have trucks with capacity in excess of 24 tons to continue using them

to their full capacity. No objection was or could be taken to the provision which requires owner-operators to reduce their capacity to 24 tons or less whenever they replace their trucks or equipment, and permits them to increase the capacity of their trucks to 24 tons at any time. That provision is clearly intended to promote long-term homogeneity of truck size in the bargaining unit, with a view to eliminating or minimizing that factor as a source of friction in the bargaining unit. However, the provision which permits certain members of the bargaining unit to continue to use their existing trucks to carry more than 24 tons, while precluding others, such as the complainant, from doing so, cannot be viewed in the same light. Rather than promoting homogeneity, this provision creates a further source of friction by precluding some employees from using their existing vehicles to full capacity while permitting others to do so, notwithstanding the fact that their operating and other costs will tend to be similar, if not identical. Thus, that provision, if applied to the grievor, would make him a second class bargaining unit member from an economic point of view even after he had been recalled to active employment, with little or no concomitant benefit to the interests of the bargaining unit members as a whole. Under the circumstances, in the absence of any objective justification for this patently discriminatory clause, I find that the respondent contravened section 68 by negotiating it into the collective agreement.

19. The parties agreed that the Board should determine whether section 68 had been breached and, if so, remain seized of this matter for the purpose of determining an appropriate remedy in the event that the parties were unable to reach agreement with respect to that matter.

20. For the foregoing reasons, the Board hereby declares that the Union has breached section 68 in the manner described above. The Board remains seized of this matter for remedial purposes in the event that the parties are unable to resolve that aspect of the case.

2704-83-R Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 91, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant, v. **Dufresne Piling Co. (1967) Ltd.**, Respondent

Bargaining Unit — Construction Industry — Practice and Procedure — Craft unit of truck drivers including drivers of all types of trucks — “Majority of time spent” test where employees engaged as drivers and labourers but paid single rate — Where time equally divided “skill for which primarily hired” governing if paid rates for primary skill — Board considering situation where not paid rates for primary skill

BEFORE: Ian C. Springate, Vice-Chairman, and Board Members N. Wilson and M. Eayrs.

APPEARANCES: *Eric del Junco and Don Swait for the applicant; John L. Razulis and Leonard S. Graham for the respondent.*

DECISION OF THE BOARD; July 31, 1984

1. The name of the respondent is amended to read: “Dufresne Piling Co. (1967) Ltd.”
2. This is an application for certification filed pursuant to the construction industry provisions of the *Labour Relations Act*. By way of this application the applicant is seeking to be certified for a bargaining unit of truck drivers in the employ of the respondent.
3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
4. The Board further finds that this is an application for certification within the meaning of section 119(1) of the Act, but that the application does not relate to the industrial, commercial and institutional sector of the construction industry referred to in section 144(1).
5. Having regard to the agreement of the parties, the Board further finds that all truck drivers in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell exclusive of those employed in the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.
6. The respondent filed a list of bargaining unit employees with 15 names. The applicant challenged the inclusion of two names on the list, namely, those of Mr. Perry French and Mr. Roger Cardinal. In consequence of this challenge a Board Officer conducted an inquiry into the status of these two individuals. The officer’s report includes a verbatim transcript of the evidence led at his inquiry.
7. The basis of the applicant’s challenge to the inclusion of the names of Mr. French and Mr. Cardinal on the list of bargaining unit employees is two-fold. One of the grounds is based on the applicant’s contention that at the relevant time both Mr. French and Mr. Cardinal were primarily employed by the respondent as labourers and not truck drivers. In the alternative, the applicant contends that if the two individuals were employed as truck drivers, given that

they were driving service trucks as opposed to the tandems, floats and dump trucks driven by the respondent's other drivers, there is not a sufficient community of interest to include them in a unit with the other drivers.

8. The community of interest issue is the simplest one to deal with. In recognition of both the structure of trade union organization in the construction industry and the provisions of section 6(3) of the Act, the Board generally describes construction industry bargaining units in terms of a particular craft or classification of employee. This means that rather than be required to apply to be certified for a bargaining unit comprised of all of the respondent's employees, the applicant can apply to be certified for a unit comprised only of truck drivers. However, where, as here, a union seeks to be certified for a unit limited to a particular craft or classification, the Board requires that all employees pertaining to that craft or classification be included in the bargaining unit. Were it otherwise, the result would be an even greater proliferation of construction industry bargaining units than is the case at present, a result that would serve no useful industrial relations purpose. Given these considerations, we are of the view that if at the time of the filing of the application Mr. French and Mr. Cardinal were in fact employed as truck drivers, then they should be included on the list of employees, regardless of the type of trucks that they were driving.

9. It is clear that both Mr. French and Mr. Cardinal did some truck driving, and that they also performed certain labouring-type work. When employees in the construction industry are engaged in the work of different crafts or classifications but paid a single rate, it has been the long-standing practice of the Board to characterize the craft in which they are employed for a majority of their time as the one governing their status on an application for certification. See *O.J. Gaffney Limited* [1964] OLRB Rep. Aug. 233. In the relatively small number of cases where an employee receives different rates of pay depending upon the type of work he is performing, the Board may conclude that the employee is in fact being transferred between two different positions, rather than being employed in a single position which contains elements of what are generally regarded as the work of two different crafts or classifications. At the hearing into this matter, the respondent submitted that given the facts of this case it would be appropriate for the Board to adopt a somewhat different approach when deciding how to characterize the two employees in question, an approach suggested (but not adopted) by the Board in *Pre-Con Murray Limited* [1969] OLRB Rep. 1003. In that case the Board indicated that in certain cases, such as where it is not possible to determine how much time an employee spends in doing two different types of work, or where his time is evenly divided, it might be appropriate to classify the employee on the basis of the skill he was primarily hired for. With respect to this approach, the Board commented:

“It seems to us, on further reflection, that the principle does have some merit, *provided the employee is paid according to the trade or craft for which he was hired.*”

(emphasis added)

10. One of the issues in this case is whether at the time the application was filed Mr. French and Mr. Cardinal were being paid different rates when driving a truck and when performing labouring work. The applicant contends that they were being paid a single rate. The respondent, however, contends that the report of the Labour Relations Officer indicates that they were being paid different rates. The evidence given by Mr. French before the Labour Relations Officer is not very helpful with respect to this issue. Mr. French indicated that the

respondent paid its labourers \$11.69 per hour, and its truck drivers \$10.50 per hour. Mr. French was asked if during the course of the application date his rate of pay was changed, to which he replied that he could not say for sure without checking his pay stubs. Mr. French was then asked if he remembered the last time his rate of pay had been changed in a day, to which he again replied that he would have to check his pay stubs. Mr. Cardinal's evidence, however, was much more specific. Mr. Cardinal indicated that he was paid two rates, namely, a regular labourer's rate as well as a rate of \$11.89 when operating an air track. We believe we can take notice of the fact that operating an air track is generally regarded as construction labourers work, for which a labourer will generally draw a slightly higher rate of pay than when performing general labouring work. Mr. Cardinal indicated quite clearly that he only received either the general labourer's rate or the rate for operating the air track, and that he did not receive a third rate when driving a truck. Indeed, when specifically asked what he was paid when driving a truck, Mr. Cardinal replied "they still pay me as a labourer". Given Mr. Cardinal's evidence, we are satisfied that he was paid only as a labourer. We regard it as unlikely that Mr. French and Mr. Cardinal would have been paid on a differing basis, especially since the evidence indicates that Mr. Cardinal drove a truck more frequently than did Mr. French. Accordingly, we are led to conclude that both Mr. Cardinal and Mr. French were paid only the rate for labourers, and did not receive a separate rate when driving a truck.

11. Both Mr. Cardinal and Mr. French indicated that they are members of the Labourers Union (presumably a reference to the Labourers' International Union of North America). From the officer's report we gather that they are employed under the terms of a collective agreement between the respondent and the Labourers Union, and further, that the respondent has been deducting union dues from their wages and forwarding them to the Labourers Union.

12. Both Mr. French and Mr. Cardinal are responsible for driving a service truck loaded with materials to a job site. If required during the day, they will also use the truck to pick up any additional required material. The remainder of their time is spent at a job site performing labouring work. The application date in this matter was Monday, February 20, 1984. On Thursday, February 16, 1984 Mr. French had been recalled to work after a three month lay-off. In his testimony, Mr. French indicated that on February 16th and 17th he spent about ninety per cent of his time working as a labourer. As for February 20th, Mr. French indicated that while he had driven a truck to and from a job site at Carleton University, for most of the day he had worked as a labourer. Based on this testimony, we are satisfied that on and prior to the application date Mr. French spent most of his time doing labouring work. In these circumstances, we are satisfied that at the time of the filing of the application, Mr. French was essentially employed as a labourer, not a truck driver, and that his name should not have been included on the list of bargaining unit employees.

13. The situation with respect to Mr. Cardinal is not as easy to discern. Mr. Cardinal testified that he had been hired as a service truck operator. However, at the time or the filing of the instant application he was regarded as an employee in a bargaining unit represented by the Labourers Union, and the respondent deducted union dues from his pay for forwarding to the Labourers Union. On a number of occasions during his examination Mr. Cardinal indicated that he did not know what proportion of his time he had spent in driving a truck. However, at one point he did state that during the two week period leading up to the application date he had spent four or five hours per day driving. Further, when pressed to give an estimation of the percentage of his time he spent performing different tasks, Mr. Cardinal stated that he spent about fifty per cent of his time driving and fifty per cent doing labouring work. Complicat-

ing the matter is a notation in the Board Officer's report wherein based upon a check of the respondent's records the officer stated:

"That Roger Cardinal's time ticket indicates that he worked 8 1/2 hours as a labourer on the application date and that in the ten days immediately prior to the application date spent the majority of his time as an air track operator."

Unfortunately, we do not actually have before us any of Mr. Cardinal's time tickets. Further, we have no evidence as to whether the purpose of the time tickets was to show the type of work Mr. Cardinal was actually performing, or only the basis upon which he is to be paid. In this regard, we know that Mr. Cardinal was not paid as a truck driver when driving a truck, but at all times received the labourer's rate.

14. The respondent contends that the best estimate as to how Mr. Cardinal divided his time was that he spent fifty per cent of the time driving a truck and fifty per cent of the time performing labouring work. In these circumstances, submits the respondent, the Board should apply the test suggested in the *Pre-Con Murray Limited* case, and categorize Mr. Cardinal on the basis of the skill for which he was primarily hired. The only evidence as to why Mr. Cardinal was hired is his own statement that he was hired as a service truck operator. For our part, it is difficult to say with any certainty how much of the time Mr. Cardinal actually spent driving a truck. However, given the evidence in the officer's report, we agree with the respondent that probably the best estimate is that he spent about fifty per cent of his time driving a truck and fifty per cent in performing labouring work. Nevertheless we do not accept the respondent's contention that the approach suggested in the *Pre-Con Murray Limited* case should be applied in determining how Mr. Cardinal might properly be classified. In this regard, we would be note that in the *Pre-Con Murray Limited* case the Board indicated that it might be appropriate to categorize an employee on the basis of the skill for which he was hired provided the employee was being paid the rate for that trade. Here, however, it is clear that Mr. Cardinal was paid only as a labourer. In these circumstances, and given that the Board's generally applied criteria do not give any clear indication as to how Mr. Cardinal should be classified, we believe the deciding factor should be how Mr. Cardinal was regarded by the respondent at the time the application was filed. In this regard, it is clear that the respondent viewed Mr. Cardinal as coming within a bargaining unit represented by the Labourers Union, paid him as a labourer, and deducted dues from his pay for forwarding to the Labourers Union. These considerations lead us to the conclusion that the respondent regarded Mr. Cardinal essentially as a labourer, and that for the purposes of this application he should be regarded as a labourer and not as a truck driver. (We would note at this point that given our earlier finding with respect to Mr. French, even if we had agreed with the respondent's position insofar as it related to Mr. Cardinal, it would not have changed the right of the applicant to be certified.)

15. As already indicated, the respondent filed a list of bargaining unit employees with 15 names. Having regard to our findings with respect to Mr. French and Mr. Cardinal, we are satisfied that there were in fact 13 employees in the unit on the date of the making of the application. The applicant filed evidence of membership with respect to eight of these employees. The evidence of membership takes the form of combination applications for membership and receipts. The applications for membership are signed by the employees. The receipts indicate a payment to the union of one dollar within the six month period prior to the terminal date fixed in this matter. The membership evidence is supported by a duly completed Form 80, Declaration Concerning Membership Documents, Construction Industry.

16. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on March 1, 1984, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

17. A certificate will issue to the applicant.

0358-84-R United Brotherhood of Carpenters & Joiners of America, Local 2041, Applicant, v. **J. R. Noel Plastering Ltd.**, Respondent, v. Labourers' International Union of North America, Local 527, Intervener #1, v. Operative Plasterers and Cement Masons' International Association, Local 124, Intervener #2

Bargaining Unit — Construction Industry — Practice and Procedure — Board practice to describe construction non-craft units by reference to all trades unrepresented and employed on application date — History of exception relating to employees engaged in installation and erection of acoustical and drywall systems — Board not persuaded that reasons exist to change long established Board practice

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members I. M. Stamp and H. Kobryn.

APPEARANCES: *Douglas J. Wray, Don Guilbeault and Rick Le Compte for the applicant; Joseph Liberman and J. R. Noel for the respondent; M. Zigler and B. Carozzi for intervenor #1; Maurice Savage and Giovanni Balanzin for intervenor #2.*

DECISION OF THE BOARD; July 25, 1984

1. This is an application for certification involving employees engaged in other than the industrial, commercial and institutional sector of the construction industry.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

3. The Board further finds that this is an application for certification within the meaning of section 119 of the *Labour Relations Act*.

4. Because of the common issue over bargaining-unit description, this application was heard together with Board Files No. 0357-84-R, 0359-84-R and 0360-84-R. The employer appeared only in Board File No. 0358-84-R. Labourers' International Union Local 527 appeared on all four, and supported the position of the employer advanced in the present file with respect to the appropriate bargaining unit. Local 124 of the Plasterers' Union also sought to intervene in all four applications. The applicant ultimately acknowledged existing bargaining rights for Labourers Local 527 with respect to all four applications, and for Plasterers Local 124 with respect to all but Board File No. 0357-84-R. It was agreed, therefore, that any

bargaining-unit description ultimately granted in this application would be subject to those currently-held bargaining rights.

5. As the respondent and Local 527 pointed out, the normal practice of the Board in describing other than craft units in the construction industry is to refer to all named trades unrepresented and employed on the date of the application. See e.g., *Duron Ontario Limited*, [1976] OLRB Rep. Nov. 734. The Board is in fact reluctant to describe bargaining units in terms of the work being performed. See e.g., *Robertson Building Systems Ltd.*, Board File No. 1598-81-R, released December 1, 1981. The applicant in this case can, however, point to a history of the Board departing from that approach with respect to employees engaged, as here, in the installation and erection of acoustical and drywall systems. It is not disputed that the United Brotherhood and various of its affiliated locals (as with the former Wood, Wire and Metal Lathers' International Union) had consistently in the years prior to 1980 been granted certificates that referred, quite simply, to "all employees engaged in the installation and erection of acoustical and drywall systems", rather than to specific trades actually employed on the date of the application. The basis for doing so is not made clear in any of the certifications referred to us, but it appears to have been an attempt by the Board to avoid representational matters turning into jurisdictional disputes, having regard to the ongoing rivalry between the Carpenters' and Lathers' Union over the work in question. That rivalry, however, culminated in a merger of the International Lathers' Union into the United Brotherhood, and the chartering of new local unions by the Brotherhood to cover the acoustical and drywall field.

6. It is the position of the respondent employer, endorsed by the intervenor Labourers' Local 527, that the merger of the Lathers' and Carpenters' Union rendered obsolete the former description of the bargaining unit being granted by the Board, and that it is now time for the Board to revert to its normal practice under *Duron*. In support of this the respondent points to the decision of the Board in a reference from the Minister dated April 9, 1980, being Board File No. 1882-79-M, and reported [1980] OLRB Rep. April 497. There the Minister asked the Board for its opinion as to whether, after the date of the aforementioned merger, a separate designation for those members of the United Brotherhood of Carpenters working in the acoustical and drywall field would be appropriate. The Board, pointing in particular to the number of other sub-groups within the Carpenters' employer and employee bargaining agencies which could be expected to claim similar treatment, and the general thrust of the statutory amendments applying to the industrial, commercial and institutional sector of the construction industry toward consolidated bargaining structures, gave its opinion that such a separate designation would not be appropriate.

7. The respondent also relies upon an unreported decision of the Board dated April 27, 1984, in *Interior Systems Contractors of Ontario and Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America*, being Board File No. 1277-83-R. That was an application for accreditation involving as respondent Local 675, a newly-chartered acoustical and drywalling Local of the Carpenters', and in which the applicant and respondent agreed upon an appropriate bargaining unit described in terms of "all carpenters and carpenters' apprentices . . .".

8. The Board has carefully reviewed the material before it, and is not persuaded that present circumstances require a sudden modification of the Board's acceptance of "appropriate" bargaining units in the acoustical and drywalling field. This is not a case of first impression, where the principles of *Duron Ontario Limited*, *supra*, might well be applied, but rather a case with a long history of describing bargaining units in a particular way, the reason for which

may no longer be as important as the fact that those are the lines along which this area has now been organized. The Ministerial reference upon which the respondent relies addressed itself only to the question of bargaining structure, within the industrial, commercial and institutional sector, and did not purport to turn its mind to the organizational issue before us now (compare, in fact, paragraph 33 of that decision). And the decision of the Board in *Roland Duquette*, [1983] OLRB Rep. Nov. 1884, makes it clear that the special rules for organizing which necessarily flow out of the single-trade bargaining scheme mandated by statute for the industrial, commercial and institutional sector of the construction industry need not have application outside of that sector, where no statutory amendments have taken place.

9. Neither do we find the accreditation decision for Interior Systems Contractors Association of Ontario, referred to *supra*, persuasive in itself. The description of the bargaining unit in that case was, as noted, arrived at by agreement, on a basis not disclosed by the decision. Whatever the considerations, we note that the bargaining unit ultimately agreed upon was itself an unusual form of hybrid description, following the words "carpenters and carpenters' apprentices" with a description of the work, in the terms:

"engaged for the application of metal and gypsum lath, gypsum drywall boards and metal components to receive same, screeds and bead accessories, acoustical ceiling systems, thermal insulation, including vapour barrier, metal door frames installed in lath and plaster and drywall partitions".

The fact is that the respondent has been able to point to no real difficulty such as would persuade the Board to change its practice at this stage, whereas the act of now making a change to this long-established form of description may by itself give rise to problems or anomalies not readily foreseen. If nothing else, there is a kind of stability that grows out of any long-standing practice, and the Board is simply not persuaded that circumstances require such a departure at this time.

10. Accordingly, the Board finds that all employees of the respondent in the Regional Municipality of Ottawa-Carleton and the United counties of Prescott and Russell, engaged in the installation and erection of acoustical and drywall systems, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

11. The Board notes the agreement of the parties that construction labourers are already represented by Local 527, and hence are not covered by the above description.

12. On the other hand, the applicant requested the Board to add a clarity note indicating that tapers *are* covered by the above description. The applicant concedes, however, that the absence of such a clarity note in the past would seem to indicate that tapers historically were *not* included in this bargaining unit description. In the Board's view, if the applicant wishes to claim entitlement to the above description on a purely historical bases, it must take that description subject to its own historical imitations.

13. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on May 15, 1984, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act* to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

14. A certificate will issue to the applicant.
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1909-83-U;1910-83-R Service Employees International Union, Local 204 (A.F.L.,C.I.O.,C.L.C.), Complainant, v. Kennedy Lodge Inc., Kennedy Lodge Limited Partnership, Earl Daynes, Daynes Health Care Limited, Medox Health Care Services, a division of Drake International Inc., and Drake International Inc., Respondents; Service Employees International Union, Local 204, A.F.L.-C.I.O.-C.L.C., Applicant, v. **Kennedy Lodge Inc.** and Medox Health Care Services, a division of Drake International Inc., Respondent

Employee Reference — Employer — Interference in Trade Unions — Related Employer — Unfair Labour Practice — Nursing home sub-contracting work performed by nursing aides — Whether persons supplied by personnel agency to replace unit employees employed by home or agency when performing unit work — Section 106(2) empowering Board to determine whether persons employees of particular employer — Whether contract out motivated by desire to avoid union and collective agreement — Whether protected by contract out clause in agreement — Whether home and agency related employers — Board distinguishing between contract out of core and peripheral activities of employer

BEFORE: Kevin M. Burkett, Vice-Chairman and Board Members J. Wilson and S. Cooke.

APPEARANCES: *G. Charney, Q.C., Jeffrey Sack, Q.C., Brian Sheehan, Steven Barrett and Eugene Laliberte for the applicant/complainant; J. Paul Wearing, Earl Daynes and David Duncan for Kennedy Lodge Inc.; B. H. Bresner, Paul Michaels and Robert Butler for Medox Health Care Services and Drake International Inc., John G. Parkinson, Q.C. and Jonathan H. Wigley for Kennedy Lodge Limited Partnership and Paul R. Tretheway for Daynes Health Care Limited and Earl Daynes.*

DECISION OF KEVIN M. BURKETT, VICE-CHAIRMAN AND BOARD MEMBER S. COOKE;

1. The name Kennedy Lodge Nursing Home and Medox (A division of Drake International) appearing in the style of cause as the names of two of the respondents in Board File 1909-83-R are amended to read Kennedy Lodge Inc. and Medox Health Care Services, a division of Drake International Inc. respectively. The style of cause in Board File 1909-83-R is further amended to delete the names of Ballycliffe Lodge Ltd., and Thompson House Home for the Aged (Don Mills Foundation for Senior Citizens Inc.) as respondents in this matter. The names Kennedy Lodge Limited Partnership, Earl Daynes, Daynes Health Care Limited and Drake International Inc. are added as respondents to this matter.

2. The name of the respondent in the style of cause in Board File 1910-83-R is amended to read Medox Health Care Services, a division of Drake International Inc. and Kennedy Lodge Inc. has been added as a respondent in this matter.

3. The Board directs that this complaint and this application be and the same are hereby consolidated.

4. This is a complaint filed under section 89 of the *Labour Relations Act* alleging violations of sections 50, 64 and 66 of the Act. In addition, a section 1(4) application has been filed and the complainant relies on section 106(2) of the Act. Although other sections of the Act were pleaded at the outset, these are the sections that have been relied upon.

5. The complainant/applicant is the certified bargaining agent for all full-time and part-time employees of Kennedy Lodge, a nursing home within the meaning of the *Nursing Home Act*, R.S.O. 1980, c. 320, located in Metropolitan Toronto, save and except office staff, registered nurses, physiotherapists, occupational therapists, supervisors, and persons above the rank of supervisor. As of October, 1983 there were approximately 144 employees in the bargaining unit represented by the complainant/applicant including approximately 92 nurse's aides and health care aides. On November 14, 1983, the respondent Mr. Earl Daynes, the manager of the Nursing Home, notified the union that effective December 16, 1983 the work of the nurse's aides and health care aides at the home would be contracted out to the respondent Medox and the nurse's aides and health care aides would be laid off. As a practical matter this "layoff" was really a termination of their employment as there would be little or no likelihood of their recall.

6. The applicant/complainant maintains that:

- (1) The decision to contract out the work of the nursing aides and health care aides was motivated and characterized by a desire on the part of the respondents to avoid their obligations to recognize and deal with the complainant in its role as the exclusive bargaining agent of employees in the bargaining unit in violation of ss. 64 and 66 of the *Labour Relations Act*.
- (2) In addition, the respondent's conduct has been motivated by a desire to avoid the provisions of the collective agreement and its obligations thereunder in violation of ss. 64 and 66 of the *Labour Relations Act*.
- (3) In the alternative, even if the Board determines that the respondent's conduct was not tainted by anti-union animus, in its usual sense there has, nonetheless, been a violation of the provisions of s. 64 of the *Labour Relations Act*. The decision to contract out the work of the nurses aides and the health care aides will seriously and irrevocably interfere with employee and trade union rights and cannot be justified as a worthy and persuasive managerial decision. Accordingly, in balancing the interests of the employees and the trade union as against the interests of the respondents, the complainant/applicant maintains that this Board must find that the interests of the employees and the union prevail and must declare that the respondents have violated s. 64 of the Act.
- (4) In addition, and notwithstanding this Board's determination with respect to the violation of the provisions of the *Labour Relations Act*, the conduct of the respondent is a massive repudiation of the provisions of the collective agreement and, as such, constitutes a viola-

tion of s. 50 of the *Labour Relations Act*. It is argued that such a determination necessarily involves a finding by the Board that the persons supplied by the respondent Medox to the respondent Kennedy Lodge are, in fact, employees of the respondent Kennedy Lodge.

- (5) In the alternative, this Board must, on the basis of the evidence, exercise its discretion to determine and declare that the respondents Medox and Kennedy Lodge are "related employers" under the provisions of s. 1(4) of the Act and are thereby bound by the collective agreement between Kennedy Lodge and the applicant/complainant union.

7. Hearings in this matter were held on January 4, January 10, February 9, March 20, April 10, April 17 and April 19, 1984. The parties were given full opportunity to call their evidence at these hearings following which written submissions were made. The evidence was transcribed by a court reporter and runs to some six volumes. It is not our intention, therefore, to summarize all of the evidence, but rather, to paint the background and make the findings of fact that are necessary to our determination. We also observe at this point that although the decision to contract for the services of nursing aides through Medox was announced on November 14, 1983 the respondents agreed not to implement that decision until a determination has been made by the Board in this matter. All parties agreed that the Board's determination should be made on the basis of the proposed agreement between the respondent Medox Health Care Services and the respondent Kennedy Lodge Nursing Home Ltd., which was signed by Medox and introduced as Exhibit #30, and on the basis of the evidence as to how that agreement would be implemented and carried out. There was no objection made that this application/complaint is somehow premature.

8. By way of background, Earl Daynes signed an offer to purchase Kennedy Lodge Nursing Home Limited from Lawrence Avenue Investments Limited for \$7,080,500 on July 6, 1982. Daynes, who operates a number of nursing homes through Daynes Health Care Limited, was given a period of time within which to arrange financing. During this period, Daynes and his partner and accountant, Mr. Gael Northey, entered into discussions with Paul Hellen and Mr. C. Harris Tod, who, through CPA Management Inc., co-ordinate the activities of a number of investors. Messrs. Hellen and Tod expressed an interest in investing in the nursing home field and, therefore, Mr. Northey forwarded to Mr. Hellen the financial information with respect to Kennedy Lodge that he had prepared in advance of the offer to purchase made by Mr. Daynes. Mr. Hellen expressed interest in Kennedy Lodge Nursing Home as an investment and on October 21, 1982 CPA Management Inc. and 452881 Ontario Limited formed the respondent Kennedy Lodge Limited Partnership with CPA as the general partner and the numbered company as the limited partner. CPA arranged for 24 investors to invest \$50,000 each toward the purchase of the Nursing Home. Kennedy Lodge Nursing Home Inc. was incorporated on November 24, 1982 with Tod, Hellen and Daynes as its officers. Kennedy Lodge Nursing Home Inc. replaced CPA as the general partner in Kennedy Lodge Limited Partnership and the 24 investors became the limited partners. The Kennedy Lodge Limited Partnership and Daynes Health Care Limited then entered into a management agreement giving to Daynes Health Care the exclusive authority to manage Kennedy Lodge Nursing Home. Daynes acquired a first mortgage with National Life Assurance in the amount of \$6,400,000 at an interest rate of 14-1/2% per annum. As a condition of providing the mortgage, National Life Assurance required Daynes and Northey to act as personal guarantors and to obtain CMHC insurance at a cost of \$126,987.

9. Under the terms of the management agreement the limited partners were to receive a 14% return per year on their invested capital. In addition, Daynes Health Care was to receive an annual management fee and the remaining profits were to be divided on the basis of 40% to Daynes Health Care and 60% to the investors. The management agreement provided further that the partnership could terminate the management agreement if, in any two consecutive years, revenues from the project were insufficient to maintain the first mortgage, cover the operating expenses and pay to the investors the 14% return.

10. The intricacies of the financial arrangements made in connection with the purchase of the Home are not relevant to our ultimate determination in this matter and do not require further elaboration. It is to be observed, however, that Mr. Northey, when making his initial investigations, calculated the wage expense of operating the Home on the basis of support staff wage rates then in effect. He did not discover until shortly before the transaction was due to close that as a result of a retroactive arbitration award those rates had been increased over time by approximately 40%. Messrs. Daynes and Northey decided to close the transaction but not to advise the limited partnership of the alteration that would be necessary to the initial income projections. It is their evidence that they made this decision on the basis that the first mortgage had been obtained at an interest rate about 4 points below that which had been initially projected and that an increase in government funding would be forthcoming so that the 14% return on investment to the investors could be maintained. In addition, Daynes and Northey were concerned that they stood to lose the \$175,000 that Daynes Health Care had already committed to the project if the deal did not close. There is some dispute on the evidence as to whether the income projections were based on a 14.52% first mortgage as referred to in Exhibit #8 or the earlier 18% that was referred to in Exhibit #17. In any event, the sale of the Nursing Home was completed on December 1, 1982 with the vendor agreeing to pay the retroactive portion of the wage increase.

11. Mr. Daynes testified that, as manager of the Home, his objectives are to ensure the highest quality care, to maintain the highest standards and to provide a homelike environment. Towards these ends, the Home was redecorated after the sale, additional wheelchairs and whirlpool baths were purchased, the linen supply was tripled, rugs were replaced with tile in many areas of the Home, a new nurses' charting system was introduced as was a new drug control system and, finally, the reception area was relocated. The provincial Ministry of Health sets and pays 66% of the ward bed fee for each bed in a nursing home. Residents pay the remainder and, in addition, the semi-private or private room surcharge. The projected 1983 budget and the financial results for the first quarter of 1983 were supplied to the limited partners at the end of May, 1983. The 1983 budget projected operating income for the year at \$280,273. The original projection for 1983 income had been \$403,000. However, the first quarter results showed only a modest profit of \$8,463. After the release of an interest arbitration award providing increases in salaries to the registered nurses in September, 1983, Mr. Northey supplied financial statements for the third quarter showing a loss in that quarter of \$63,263 and an added expense for earlier periods of \$33,310 to reflect the retroactive provisions of the aforementioned nurses' arbitration award. Mr. Daynes returned from holidays on November 9, 1983 and was presented with the third quarter financial statements and the fourth quarter, 1983 projections. The projections showed an operating loss of \$46,948 for the fourth quarter of 1983 for a total 1983 loss of \$148,277 and a further projected loss of \$249,026 for 1984. Mr. Daynes testified that it was at this point that he first considered contracting for the services of ward aides. When asked in cross-examination by counsel for the complainant/applicant trade union why the Home was losing money, Mr. Daynes referred to the high wage rates that Mr. Northey did not project and the abuse of sick leave that was costing the Home \$90,000

per year. It is the respondents' evidence that without additional financing the losses that the Home is incurring, if allowed to continue, would put the Home into bankruptcy.

12. At a meeting with the union on April 29, 1983 Mr. Daynes raised his concern with the amount of sick pay that was being expended. He estimated that \$10,000 per month was being spent in this regard. The evidence discloses that Mr. Laliberte, a union business representative, who, along with Nora Graham, the business representative with direct responsibility over the local, were present at the meeting, asked Mr. Daynes for a letter from the hospital setting out the names of those who were abusing the sick leave plan. The Home provided such a letter on May 3, 1983 but did not receive any reply from the union. Mr. Laliberte testified that he found the letter ambiguous and asked Nora Graham to contact the Home for clarification. Mr. Laliberte testified further that he heard nothing more until he was asked to meet with Mr. Daynes on October 18, 1983. Mr. Laliberte and Ms. Graham met with Mr. Daynes and Mr. D. Duncan, the administrator of the Home, on October 18, 1983. Mr. Daynes again referred to the abuse of sick leave estimating that the Home was spending about \$90,000 a year on this item, proposed to substitute an insured weekly indemnity plan to replace the sick leave plan then in place and, for the first time, raised the possibility of contracting out. It is not disputed that Mr. Laliberte responded by suggesting that he might be able to obtain the agreement of the members of the bargaining unit if the Home was prepared to agree to a no contracting out clause. Mr. Laliberte testified that he attended a union membership meeting on October 27th at which he discussed the implication of an Inflation Review Board ruling that had been made in August and raised the possibility of moving to an insured weekly indemnity type of sick leave plan in return for a no contracting out clause. It is his evidence that the membership agreed to accept weekly indemnity for a no contracting out clause and that he called Mr. Daynes to inform him and was advised that he was on vacation. Mr. Daynes called Mr. Laliberte upon his return from vacation and a meeting was arranged for November 14, 1983.

13. It was at that meeting that Mr. Daynes provided the union with written confirmation of his decision to contract for the services of ward aides. Mr. Daynes testified that he asked Mr. Laliberte about the sick leave problem and was told that he had done nothing, had not received the May 3rd letter and that it was unresolved. It is his evidence that at this point he handed Mr. Laliberte the letter confirming the Home's intention to contract out. Mr. Laliberte, on the other hand, maintains that his comment about not receiving the letter of May 3rd was made at the October 18th meeting and asserts that he told Mr. Daynes of his authority to commit the membership to a weekly indemnity plan in return for a no contracting out clause. Mr. Laliberte testified that it was at this juncture that Mr. Daynes gave him the letter.

14. The evidence establishes that sick leave usage in the period July through October, 1983 was less than in the same period the year before and less than in the preceding months of 1983. In fact, \$62,000 had been paid out in sick leave benefits up to October 18, 1983, and not the \$90,000 suggested by Mr. Daynes on that date when he met with the union. Mr. Daynes had visited Thompson House (another nursing home), in August 1983 for the purpose of observing the contracting out at that operation. Mr. Daynes contacted Medox on November 9, 1983 and met with an official of that company on November 11, 1983. After some discussion with respect to the hourly rate, Medox confirmed with Mr. Daynes, on November 14, 1983, that \$6.75 per hour, including supervision, would be a satisfactory rate. Medox was of the view that as of November 14, 1983 it had an oral agreement with Kennedy Lodge subject to signature. Mr. Daynes testified that he told the Medox representative that he would be meeting with the

union on November 14 and that if a positive response was not forthcoming he would be going ahead with the contract effective December 16, 1983.

15. The proposed contract between Medox Health Care Services and Kennedy Lodge Nursing Home Ltd. which was agreed between these parties and which both parties acknowledge that they are prepared to execute and abide by, is reproduced below:

BY AND BETWEEN:

MEDOX HEALTH CARE SERVICES, A Division of Drake International Inc., (hereinafter referred to as 'MEDOX'),

AND:

KENNEDY LODGE NURSING HOME LTD., (hereinafter referred to as "KENNEDY")

WITNESSETH“

WHEREAS MEDOX maintains a health care aide/nursing aide service;

AND WHEREAS KENNEDY desires to secure such health care/aide nursing aide service;

NOW THEREFORE KENNEDY and MEDOX mutually agree as follows:

1. LOCATION

Kennedy Lodge Nursing Home Ltd., 1400 Kennedy Road, Scarborough, Ontario.

2. TERM OF AGREEMENT

The terms of this Agreement shall commence on the 16th day of December, 1983, and will continue until the 31st day of December, 1985, subject, however, to the right of either party of the Agreement to terminate this Agreement upon thirty (30) days written notice to the other, except in the case of non-performance on the part of MEDOX, IN WHICH EVENT THIS AGREEMENT MAY BE TERMINATED BY KENNEDY without notice.

3. SERVICE(S)

MEDOX agrees that the health care aide/nursing aide services covered by this Agreement shall be performed in accordance with accepted practices and standards, and the conduct of the MEDOX personnel operating under this Agreement shall be guided by MEDOX's standing

orders and policies, and by such written rules as may be agreed upon between KENNEDY and MEDOX.

4. BILLING

MEDOX billing shall be thirty (30) days in arrears of service. MEDOX will invoice monthly, by the 10th of each month following the month in which said services were performed.

KENNEDY agrees to process and pay all invoices within ten (10) days after receipt of same.

5. Rates

KENNEDY shall pay to MEDOX, for the services herein granted, the following rates or charges:

For the period, December 16, 1983 — December 31, 1984 inclusive —

Hourly Rate —

Standard	\$6.75
Statutory and Legal	
Holidays	1-1/2 x \$6.75

For the period, January 1, 1985 — December 31, 1985 inclusive —

Hourly Rate —

Standard	\$7.10
Statutory and Legal	
Holidays	1-1/2 x \$7.10

The rates specified above include all fringe benefits, such as vacation pay, income tax, unemployment insurance, workers' compensation, Canada pension, as well as overtime where not specifically authorized by KENNEDY.

The rates specified above will remain constant, and in effect during the term of this Agreement.

The rates specified above include the costing of a part-time staffing co-ordinator/supervisor who will be located at KENNEDY for a minimum period of time each and every week.

6. MEDOX — Accepts Following Responsibilities:

- a) Provide adequate and consistent staffing of health care aides/nursing aides, meeting the requirements of KENNEDY.
- b) Ensure all MEDOX personnel assigned to work with KENNEDY have accredited health care aide/nursing aide certificates are medically certified, and are covered by malpractice and liability insurance, and protected under the provisions of the Workmen's Compensation Insurance.
- c) Meet all requirements of the Employment Standards Act, and the Federal Income Tax Act.
- d) Provide orientation to new MEDOX personnel, by MEDOX supervisory personnel, after the initial phase-in.
- e) Adhere to Kennedy's dress code, as provided to MEDOX by KENNEDY.
- f) Review and discuss at least bi-weekly with KENNEDY nursing staff the requirements of KENNEDY, and receive progress reports on the services provided and MEDOX personnel.
- g) Be responsible for providing the day-to-day supervision of health care aides/nursing aides at KENNEDY, it being understood that the control and direction of all MEDOX personnel in the employ of MEDOX shall at all times be the responsibility of Medox and that MEDOX shall be responsible for the discipline, scheduling or rescheduling of MEDOX personnel, and that KENNEDY personnel shall have no authority or responsibility for discipline, scheduling and rescheduling of MEDOX personnel, save only in a reporting function to the MEDOX supervisor.
- h) Provide twenty-four (24) hour telephone service, seven (7) days per week by qualified MEDOX staffing coordinators.

7. KENNEDY — ACCEPTS FOLLOWING RESPONSIBILITIES:

- a) Ensure that MEDOX supervisory staff is kept fully informed of any special care which residents of KENNEDY may require.
- b) Provide concise job descriptions to MEDOX and any special regulations and functions specific to KENNEDY.
- c) Meet with authorized MEDOX supervisory staff at regular intervals to discuss staffing requirements, and to provide reports on services required, and given.

- d) KENNEDY nursing personnel will coordinate the care requirements of the residents, and liaise closely with MEDOX supervisory staff in that regard, and in addition KENNEDY will keep MEDOX fully informed as to staffing requirements.

16. Medox Health Care Services is one of approximately seventeen divisions of Drake International Inc. As an unincorporated division of Drake, Medox has no independent legal personality. Drake was incorporated in Ontario in or about 1951 and carries on business through its divisions as a supplier of personnel to various industries. Medox is the division of Drake that supplies personnel to the health care industry, including hospitals, nursing homes and health clinics, physicians' offices, private homes and other health care settings, and as such is in competition with a number of other suppliers of health care personnel in the province of Ontario. The business generated by Medox represents approximately 14% of the business of Drake overall. It is estimated that the contract with Kennedy Lodge will generate 20 — 25% of Medox's total income. There is no corporate or other relationship, except for the proposed contract set out above, between Medox and/or Drake and any of the other respondents in this matter.

17. Mr. Daynes testified that the duties of health care aides include the dressing, feeding, bathing and toileting of residents and the answering of call bells. These are the duties performed by the health care aides employed by Kennedy Lodge under the direction of charge nurses employed by Kennedy Lodge in conformance with job descriptions prepared by Kennedy Lodge. The same duties will be performed by the health care aides supplied by Medox if Kennedy Lodge is permitted to proceed with its plan to contract for these services with Medox. The Nursing Home employs 15 charge nurses, who are qualified R.N's. Six of these charge nurses are assigned on days, six on afternoons and three on nights. They report to a working supervisor, who is the Assistant Director of Nursing on days, who in turn reports to the Director of Nursing. Under the proposed contracting arrangement the Director of Nursing, the nursing supervisors and the charge nurses who are employed by the Nursing Home will remain in place and will continue to be employed by the Nursing Home. The deployment of health care aides, which will not change under the contracting arrangement, has 21 health care aides on days (nine on the third floor, six on the second floor, five on the main floor, and one on the ground floor), 20 health care aides on afternoons (eight on the third floor, and the same complement as on days throughout the remainder of the Nursing Home) and 11 health care aides on nights (four on the third floor, three on the second floor, three on the first floor and one on the ground floor). The ratio of health care aides to charge nurses during a 24-hour working day, which will not change under the contracting arrangement, therefore, is just over 4:1.

18. Kennedy Lodge presently pays its health care aides approximately \$11.50 per hour including benefits under the terms of its collective agreement with the complainant/applicant trade union. Under the proposed contract with Medox, Kennedy Lodge will pay \$6.75 per hour, including benefits, supervision and administrative cost to Medox. Medox, in turn, will pay the health care aides \$4.25 — \$5.50 per hour depending on experience. The contract stipulates that the specified rates include the cost of "a part-time staffing co-ordinator/supervisor who will be located at Kennedy for a minimum period of time each and every week." Mr. Daynes testified that Kennedy Lodge will be requiring supervision on an 8-hour per day basis and on call the rest of the time. Mr. Butler, the national marketing manager for Medox, testified that Medox will assign a supervisor to Kennedy Lodge for a total of eight hours per day, forty hours per week and that, in addition, a part-time supervisor will be available. He maintained as well that Medox supervision will be available by phone 24 hours per day. It is the evidence of both

Mr. Daynes and Mr. Butler that Medox will hire the aides who will work at Kennedy Lodge, will schedule their hours, supervise their work to ensure that it is in conformity with Kennedy Lodge standards and discipline these aides when required. The daily report will continue to be given by the charge nurse but it is their evidence that in future the charge nurse will report any work-related difficulties or misbehaviour by an aide to the Medox supervisor. Mr. Butler also testified that the Medox supervisor will be responsible for job evaluation, on-hands training and in-service programmes. The aides supplied by Medox will wear a Medox name tag and will be paid by Medox.

19. It is not disputed that the procedures to be followed and the standards to be met by the aides referred by Medox will be laid down by Kennedy Lodge. Although the current operating manuals have not been amended to take into account the existence of Medox, Mr. Daynes testified that they will be if the contracting arrangement is carried out. Kennedy Lodge will provide detailed job descriptions. The personnel records for the aides will be kept in the Nursing Home pursuant to section 91 of the Regulations to the *Nursing Home Act* but these records will be maintained by Medox. The issue of Kennedy Lodge's authority to have an individual aide supplied by Medox replaced was brought up in the examination of both Mr. Daynes and Mr. Butler. The relevant part of Mr. Daynes' cross-examination was transcribed as follows:

Q. It doesn't concern you what kind of person might come in to work for that price?

A. I have already testified, sir, that I have taken a hard look at the application form, and the expertise that they are looking for, and I am quite satisfied that these will be good people.

Q. But you are not in the least concerned of what these people are getting paid?

A. Well, for instance, sir, if they are not the people that we want, they won't be there, and Medox will be instructed to get rid of them. I am sure with the track record that Medox has that they won't be sending those people that we are not happy with.

Q. So if you are not satisfied with anybody, you will have Medox get rid of them, is that correct?

A. Medox will be instructed to put them somewhere else, but not in our home, that is correct.

He replied in the affirmative when later asked if Kennedy would act to have an aide transferred or terminated if it didn't like what the aide was doing. The relevant part of Mr. Butler's cross-examination in this regard was transcribed as follows:

Q. One of those items states that although the employees will not be employed by the facility, the administrator retains control over who can work in it, can you tell the Board what happens if the administrator advises you, or somebody from Medox, that he doesn't want a particular employee in the facility?

- A. The supervisor would at that point, depending on the reason why they wouldn't want them, remove the employee from the facility and in all likelihood, depending on the nature, if it was an offence or something that would drastically or was drastically affecting the quality of care, they would either be transferred to another facility, or to home care, or terminated.
- Q. And let me understand how the discipline works. You both agreed, I think, that the administrator, Daynes, and you agreed that if the administrator wants someone out of the house, you would do something about it, transfer them or fire them, depending on what they did?
- A. Yes.
- Q. So the ultimate authority to fire them as far as Kennedy Lodge is concerned is lodged with the administrator, is that correct?
- A. That would only be if they requested someone out, in most instances our supervisor would be the one who would make the recommendation, and do it. It should never get to the administrator if she is doing her job, or he is doing his job.
- Q. Well, as I understand, the director of nursing can come to you, or to your supervisor and say "get that nurse's aide out of here, we don't like her", and you would do it.
- A. If it was reasonable, of course, yes.
- Q. Even if it wasn't reasonable, you might do it?
- A. Well, I don't know if I would do it unless it was reasonable.
- Q. Your supervisor would get instructions if they want something?
- A. Well, I think the normal event is that so and so is not doing their job, they are not up to par, and they would do an evaluation and report back that they are either capable of doing it or not, and if they felt they were not, they would be removed.
- Q. But let us say your supervisor thought that, and this is all hypothetical, but you are a reasonable business man, and you are dealing with a substantial number of nurses, and a substantial portion of your business, and if the administrator says look, I am not happy with this person, and you really felt the administrator wasn't right, you would simply transfer that person from one home to another home to avoid difficulty wouldn't you?
- A. It is hypothetical, but probably we would, yes.

20. Mrs. Shirley Robinson, an R.N. with 26 years of experience who has worked as a charge nurse at Kennedy Lodge for the past three years, was called to testify by the applicant/complainant. She works a steady 7:00 a.m. to 3:00 p.m. shift and is responsible for an area of the 3rd floor of the Home housing 45 residents, many of whom, by her evidence, are confused. She supervises 4-1/2 aides who, it can be taken from her evidence and from the job description of the nurse's aid that was put in evidence, form a part of the nursing care team. The job description for a nurse's aid at Kennedy Lodge reads as follows:

1. The Director of Nurses shall employ Nurses Aides as determined by the approved staffing pattern.
2. It is desirable that Nurses Aides have a "*Health Care Aide*" certificate, or are prepared to take the Health Care Aide course when it is available.
3. The Nurses Aides shall be responsible to the Charge Nurse for assisting residents to meet all basic needs.
4. The Nurses Aide, under the supervision of the Registered Nurse shall:
 1. Assist newly admitted residents in settling into the home routine.
 2. Bathe bed residents or assist ambulatory residents in taking tub bath or shower, (each resident to have weekly, tub bath or shower, skin to be checked for abrasions or reddened areas, bruises, etc.). Hair to be washed regularly. Skin cared for.
 3. Brush and comb hair, (each resident to have brush and comb, marked with his name on it). These articles to be kept clean and free of hair.
 4. Clean and cut finger nails. Keep nails short. Podiatrist will attend to toe nails.
 5. Oral care:- See the resident cleans his teeth, using a toothbrush and dentifrice. Clean dentures as necessary. Soak overnight if possible. (Tooth brush to be marked with name.)
 6. Assist with serving meals and Keeding as necessary. Provide between meal nourishment.
 7. Assist resident with dressing. Shave as necessary.
 8. Give urinals and bed pans as necessary. Toilet residents frequently before and after meals.
 9. Collect urine and faecal samples.
 10. Answer signal lights as quickly as possible.

11. Assist residents in use of wheelchairs and walkers and assist in activity programs, and reality orientation programs. Walk residents as necessary and assist and participate in exercise programs.
12. Make beds and change linen as necessary. Residents must have at least three complete changes of bed linen per week.
13. Clean utility rooms, medication rooms and linen rooms.
14. Clean resident's bedside table and clothes closet. Tidy drawers (if resident unable to do it).
15. Wash resident's bedstead, mattress, etc. once weekly.
16. Overbed tables, geriatric chairs, wheelchairs, walkers and any other equipment used by resident, to be kept clean.
17. Collect and bag soiled linen, personal laundry to go in proper coloured bag. All soiled linen to be flushed clean first.
18. Store clean linen, including residents' personal clothing.
19. Perform other duties as may be assigned.

The job description for a charge nurse at Kennedy Lodge reads as follows:

The Director of Nursing shall, in consultation with the Administrator, appoint a Registered Nurse for each nursing unit. No person other than a nurse registered with the Ontario College of Nurses shall be eligible for appointment as a Registered Nurse. The Registered Nurse shall be responsible to the Director of Nursing for the day-to-day management of the nursing unit.

Without limiting the generality of the foregoing, the Registered Nurse shall:

1. Supervise the work of all nursing staff assigned to the unit.
2. Become directly involved along with nursing aides in care of residents on his/her nursing unit.
3. Be responsible for the observance of all policies and procedures established in the home.
4. Ensure that all attending physicians' orders are executed correctly.
5. Ensure that nursing care plans are developed for each resident adequate to meet his/her needs, and are current and readily understood by all nursing staff.
6. Be responsible to the Director of Nursing for the accounting for and

safeguarding of all drugs, narcotics, and medications maintained on the unit.

7. Maintain supplies on the unit at such a level as to ensure efficient operation.
8. Ensure that all information pertaining to residents is protected from unauthorized use while on the assigned unit.
9. Prepare work assignments and ward duties for nursing staff on each unit in accordance with policies of the Home.
10. Report to Director of Nursing any resident who in his/her opinion is not making reasonable progress toward recovery, or is not being visited frequently enough by the attending physician.
11. Prepare such reports as may be requested by the Director of Nursing.
12. Keep the Director of Nursing advised of all matters about which he/she should have knowledge.
13. Participate actively in ward circles with staff members.
14. Ensure that all medical records, i.e. nurses' notes, medicine sheets are kept up-to-date (see policy re: medical records).
15. Perform such other duties as may be assigned.

Mrs. Robinson testified that it is the charge nurse who develops and alters the care plans for each patient, gives a report to the oncoming shift at the end of the shift and assigns the duties for the day to the nursing aides. Although acknowledging that the bathing, feeding and skin care duties of the aides are sometimes routine, Mrs. Robinson testified that supervision of the aides by the charge nurse is ongoing. It is her evidence that she monitors their work and speaks directly to an aid that is not performing as she should be. When asked if one person could supervise all of the aides in the building, she replied that she didn't see that it was possible. Mrs. Robinson agreed that aides supplied by an agency have been called into the Home in the past.

21. The scheme of the *Nursing Home Act* provides that the nursing homes in the province must be licensed and must operate in accordance with government standards as set out in the Act and the Regulations thereunder. Failure by a licensed operator to comply with the Act, the Regulations and the terms of the licence may result in the revocation of the licence. The Regulations under the *Nursing Homes Act* place specific responsibilities upon a nursing home and its personnel. Section 56 of the Regulations under the *Nursing Homes Act* provides as follows:

56. (1) Every resident shall be given nursing care in accordance with his needs and the care shall be given under the supervision of a registered nurse or a registered nursing assistant as directed by a physician.

(2) A thorough assessment of each resident's needs shall be made on a regular basis by the registered nursing staff and a care plan shall be devised for every resident.

(3) A reassessment of each resident's needs shall be made on a regular basis and the resident's care plan shall be revised where the reassessment indicates that this is required.

(4) Where a resident's attending physician so requires, a resident's vital signs shall be observed and recorded regularly by the registered nursing staff and the information shall be reported to the physician as he directs.

(5) The nursing staff shall provide restorative nursing care to a resident who requires such care and in particular to one who requires bladder or bowel training, gait training, care of weak or paralyzed limbs, or maintenance of range and joint movements.

(6) The nursing staff shall give to a resident who is confined to bed or to a bed-chair, care that includes turning every two hours, positioning and measures to prevent skin disorders or care for skin disorders.

(7) The nursing staff shall instruct residents in the use of self-care devices.

(8) The nursing staff shall ensure that residents who are confined to bed or who are incontinent have a complete bath daily or more frequently where necessary to maintain cleanliness and that ambulant residents have a complete bath at least once a week.

(9) The nursing staff shall ensure that proper and sufficient care of each resident's body is provided to safeguard the resident's health and to maintain personal hygiene.

(10) Each resident's bed clothing shall be kept clean and free from odours and residents' bed linen shall be changed at least twice a week.

(11) The nursing staff shall use proper sterile nursing techniques at all times.

(12) All nursing equipment shall be maintained in a good state of repair, be properly cleaned and be readily available for use and a supply of nursing equipment adequate to meet the needs of the nursing home shall be on hand at all times.

Section 57 of the Regulations provides as follows:

57. (1) Every nursing home shall provide a minimum of one and a half hours of nursing and personal care each day to each extended care resident and the care shall be given under the supervision of a registered nurse or registered nursing assistant and under the direction of a physician.

(2) Subject to subsection (3), the minimum amount of nursing and personal

care that shall be given to each extended care resident each week by a person referred to in column 1 of the following Table shall be that amount of time set out opposite thereto in column 2 of the following Table:

TABLE

ITEM	COLUMN 1 STAFF CATEGORY	COLUMN 2 MINIMUM AMOUNT OF TIME
1	Registered Nurse	1/2 hour
2	Registered Nursing Assistant	1-1/2 hours
3	Health Care Aide	8-1/4 hours
4	TOTAL	10-1/2 hours

(3) The Director may, having regard to the mental and physical condition of a resident, require that an extended care resident receive an amount of care in excess of that set out in subsection (2).

(4) Notwithstanding subsection (2), an extended care resident shall be given the nursing and personal care in accordance with his needs that is ordered by his physician.

(5) Time given to housekeeping, laundering or cooking duties by a registered nurse, registered nursing assistant or health care aide shall not be included in calculating the nursing and personal care time of a registered nurse, registered nursing assistant or health care aide required to be given under subsection (7).

Sections 60(1) and (2) of the Regulations provide:

60. (1) Every nursing home shall have a registered nurse who is designated as the director of nurses, and who is responsible for,

- (a) the organization, direction and evaluation of nursing care;
- (b) directing the work of the nursing staff in the nursing home; and
- (c) the organization and direction of in-service training programs for nursing staff.

(2) Every nursing home shall conduct in-service training programs for all nursing staff in the nursing home at least once a month.

Section 61 of the Regulations provides:

61. Every extended care unit shall have at least,

- (a) one registered nurse on duty during each day shift;
- (b) one registered nursing assistant on duty during each afternoon shift;
and
- (c) one registered nursing assistant on duty during each night shift.

22. Kennedy Lodge is party to a collective agreement with the Ontario Nurses' Association covering its registered nurses. Article 2.02 of that agreement reads:

2.02 In order to protect the standard of nursing care, the Employer agrees that no one outside of the above-mentioned bargaining unit shall perform the work normally performed by members of this bargaining unit except:

- (a) in cases of emergency;
- (b) for the purposes of performing experimental work;
- (c) when instructing nurses or other employees;
- (d) when nurses are not available due to being late for work or absent from work for any reason, except layoff.

23. Article 2.03 of the collective agreement between Kennedy Lodge and the applicant/complainant trade union provides:

2.03 No Contracting Out

Where the Employer finds it necessary to contract out work performed by the bargaining unit, and where such contracting out results in a lay-off of employees, the Employer undertakes to meet with the Union no less than thirty (30) days in advance of such lay-off to consider what might be done to minimize the adverse affects upon the employees concerned.

24. The relevant provisions of the *Labour Relations Act* are set out below:

1. (4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof, as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

50. A collective agreement is, subject to and for the purposes of this Act, binding upon the employer and upon the trade union that is a party to the

agreement whether or not a trade union is certified and upon the employees in the bargaining unit defined in the agreement.

106.(2) If, in the course of bargaining for a collective agreement or during the period of operation of a collective agreement, a question arises as to whether a person is an employee or as to whether a person is a guard, the question may be referred to the Board and the decision of the Board thereon is final and conclusive for all purposes.

64. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

66. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;
- (b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or
- (c) shall seek by threat or dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

77. Nothing in this Act prohibits any suspension or discontinuance for cause of an employer's operations or the quitting of employment for cause if the suspension, discontinuance or quitting does not constitute a lock-out or strike.

SUBMISSIONS

25. The Board received written submissions from the parties that extend to approximately 230 pages. The Board has carefully considered these submissions which are summarized below.

26. The applicant/complainant argues firstly that the evidence establishes a breach of sections 64 and 66 of the Act. The applicant/complainant reminds the Board at the outset that the onus is upon the respondents to establish on the balance of probabilities that there has not been a breach of these sections and further that it is not sufficient to establish legitimate business motivation if there coexists anti-union motivation. The applicant/complainant relies on *Consolidated Bathurst*, [1983] OLRB Rep. Aug. 1411 and *C. E. Lummus Canada Ltd.*, [1983] OLRB Rep. Oct. 1685 in support of the proposition that the failure of an employer to meaningfully consult with a trade union about a business decision having such a profound impact on the bargaining unit constitutes a breach of section 64 of the Act. The applicant/complainant maintains that in this case there was such a failure to discuss. The applicant/complainant also argues that a business decision that results in a refusal to employ or continue to employ a person solely for the purpose of avoiding the provisions of the collective agreement, and in particular the wage provisions, constitutes a violation of section 66 of the Act. *Westinghouse Canada Limited*, [1980] OLRB Rep. Apr. 577, *K Mart Canada Ltd.*, [1983] OLRB May 649, *Humber College* [1979] OLRB Rep. June 520 and *Carroll Electric (1982) Limited*, [1982] OLRB Rep. Dec. 1814 are cited in support of this proposition. The applicant/complainant submits that no reason has been advanced by the respondent Kennedy Lodge for its decision to contract out the work in question, other than a desire to avoid the monetary provisions of the collective agreement. The applicant/complainant maintains that the Board failed to distinguish between business decisions made for reasons of technological advancement, change in production methods, automation etc. which have as a side effect the loss of jobs in the bargaining unit and a decision made for no other reason than to extricate an employer from the provisions of the collective agreement in both *Kennedy Lodge Nursing Home*, [1980] OLRB Rep. Oct. 1454 and *Heritage Nursing Home Limited*, [1981] OLRB Rep. Jan. 31. The applicant/complainant asks the Board to make this distinction and to find a violation. Finally, the applicant/complainant, citing *International Wallcoverings*, [1983] OLRB Rep. Aug., 1316 and *Canadian Imperial Bank of Commerce*, [1979] 1 Can. LRB 266, argues that even in the absence of anti-union animus, where there is no persuasive or worthy counterbalancing employer interest to support a decision which involves the replacement of union with non-union labour, but does not result in any other significant advantage to the employer, the Board is entitled to balance the competing interests and make a finding of a violation under section 64. It is submitted that the nature of the subcontracting arrangement in this case does not evidence a "persuasive or worthy" purpose sufficient to justify the impact which it will have on the bargaining unit.

27. The applicant/complainant also relies on sections 50 and 106(2) of the Act. The applicant/complainant submits that the Board has the authority under section 106(2) of the Act to determine if the persons supplied by Medox are employees of Kennedy Lodge. It is submitted that if they are employees of Kennedy Lodge and remain so at a time when more senior employees covered by the collective agreement are on layoff there exists a massive breach of the collective agreement, thereby constituting a breach of section 50 of the Act. *Maple Leaf Taxi Limited*, [1982] OLRB Rep. Nov. 1671, *Eastern Sheet Metal and Mechanical Contractors*, [1981] OLRB Rep. Jan. 26 and *Carroll Electric (1982) Limited*, *supra*, are cited in support of the Board's authority to find a breach of section 50 of the Act where a party to a collective agreement "massively, totally and in a wholesale manner" repudiates its provisions. The applicant/complainant asks the Board to follow the approach adopted

in the arbitration cases, and in particular, *Amplitrol Electronics Limited*, (September 2, 1969) unreported (Weiler), *Goodyear Tire and Rubber Company*, 16 L.A.C. (2d) 177 (Gorsky), *Riverdale Hospital*, 7 L.A.C. (2d) 40 (Schiff) and *Regional Municipality of Waterloo*, (1977) 16 L.A.C. (2d) 280 (Brandt), and to find that the persons supplied by Medox are employees of Kennedy Lodge. The applicant/complainant submits that where, as in this case, there is an ongoing collective bargaining relationship the arbitral jurisprudence is more helpful than the jurisprudence of the Board in attempting to identify the employer in certification cases. The applicant/complainant relies on the caution expressed by the Board in *Re K Mart*, *supra*, against applying the factors relied upon by the Board in certification matters "where an employer has structured its affairs in a manner which deliberately attempts to evade collective bargaining obligations in respect of a substantial number of individuals performing bargaining unit work on the premises."

28. In the final alternative it is submitted that Kennedy Lodge and Medox are related employers within the meaning of section 1(4) of the Act and, therefore, are both bound by the provisions of the collective agreement. *Charming Hostess*, [1982] OLRB Rep. April 536, *J. H. Normick Inc.*, [1979] OLRB Rep. Dec. 1177, *Complete Car Care Centre*, [1983] OLRB Rep. Aug. 1293 and *Don Mills Bindery Inc.*, [1983] OLRB Rep. Dec. 2008 are cited in support of the proposition that the Board will determine whether there is common control or direction of "activities" as well as business and will do so on the basis of functional interdependence as well as corporate interrelationship. It is submitted that, at the very minimum, the nursing care activities carried out at Kennedy Lodge are so integrated as to necessarily be under the common control and direction of both Kennedy Lodge and Medox. The *Nursing Home Act* and Regulations are cited in further support of this conclusion. The reasoning expressed in *Acto Builders (Eastern) Limited*, [1979] OLRB Rep. June 645 and *Rivard Mechanical*, [1981] OLRB Rep. May 550 is relied upon in support of the exercise of the Board's discretion under section 1(4). The applicant/complainant maintains that the only effective way of ensuring the continuance of collective bargaining rights to the affected employees is to issue a section 1(4) declaration.

29. The respondents Kennedy Lodge Nursing Home Inc., Daynes Health Care Ltd. and Earl Daynes submit, in response to the allegation that sections 64 and 66 have been violated, that, absent any express authority, it is accepted that it is management's prerogative to unilaterally change working conditions for business reasons during the term of a collective agreement. *Russell Steel Ltd.* (1967) 17 L.A.C. 253 and *Kennedy Lodge Nursing Home*, (1981) 28 L.A.C. (2d) 388 are cited in support of this argument. In this case, however, where article 2.03 of the collective agreement contemplates contracting out of work performed by the bargaining unit "where the employer finds it necessary" it is argued that there is express authority for the very action that has been taken; that is, to contract out the work in question for the legitimate business reason of improving profitability. These respondents submit that the existence of a clause giving the employer the express authority to contract out along with the consultation which took place, distinguishes this case from *Westinghouse Canada Limited*, *supra*. The respondents submit that there is nothing untoward in the arrangements and undertaking made in connection with the decision to purchase the Home. These respondents argue that the events which unfolded commencing with a retroactive wage increase of 40% awarded to health care aides in August, 1982, through the first eleven months of business (December, 1982 to

October, 1983), to the preparation of the third quarter 1983 financial statements (showing a loss over the first three quarters of \$68,019) and a projected loss of \$46,948 for the fourth quarter of 1983 and a further \$249,026 for 1984 created a financial crisis which caused Mr. Daynes to consider contracting out of nursing aid work on November 9, 1983. These respondents suggest that an economic crisis exists where the Home is unable to cover its expenses in any year or is unable to pay the basic return on investment in two consecutive years so that the management agreement may be terminated. These respondents submit that there was consultation by management with the union beginning on April 29, 1983 when Mr. Daynes made the union representatives aware of the "excessive operating costs" and, in particular, the abuse of the sick pay provisions of the collective agreement. These respondents ask the Board to find that the union did not follow up or attempt to co-operate with management in responding to the financial crisis. It is argued that where the evidence of Mr. Daynes, as corroborated by Mr. Duncan, is in conflict with that of Mr. Laliberte with respect to what transpired at the union/management meetings of April 29, October 18, October 27 and November 14 an adverse interest must be drawn against the union because of its failure to call Norah Graham who was present at these meetings and could have corroborated Mr. Laliberte's testimony. It is submitted that the respondents led evidence which establishes that the reasons for contracting out were legitimate business reasons and to also establish that there were no other reasons. These respondents rely on *Heritage Nursing Home Limited, supra* in support of its initial submission that if a union wishes to protect itself from the risk of contracting out it may attempt to do so at the bargaining table. It is argued that where, as in this case, there is a clause which expressly gives the employer the right to contract out and where, as in this case, the decision is taken for a legitimate business reason, there can be no finding of a violation of section 64 or 66 of the Act. Finally, in response to the applicant/complainant's submissions with respect to the balancing of interests, these respondents read *International Wallcoverings, supra*, as suggesting that a breach of section 64 may be found without a finding of anti-union motive only in "instances of clear mistake or for discipline clearly out of all proportion to the misconduct in issue". In any event, it is argued that the assertion that there is a significant imbalance in favour of protected employee rights completely ignores the fact that the employees' bargaining agent bargained for the express rights in the collective agreement from which the employer in this case derives its authority to contract out.

30. In response to the allegation that it has violated section 50 of the Act, these respondents maintain that Kennedy Lodge, at all material times, acted within the terms of the collective agreement and specifically article 2.03. It is further submitted that the applicant/complainant now seeks to resile from the language of article 2.03 that it agreed to during bargaining. These respondents concede that the individuals who will perform the aide work under the contract with Medox will be employees within the meaning of section 1(3) of the Act. However, it is argued that section 106(2) empowers the Board to conduct duties and responsibilities examinations to ascertain if a person is an employee within the meaning of section 1(3)(b) of the Act and that the issue of the identification of the employer in this case is not a matter for reference within the ambit of section 106 of the Act. These respondents maintain that the arbitration cases relied on by the applicant/complainant in support of its contention that Kennedy Lodge remains as the true employer are distinguishable on their particular facts. It is submitted that in the *Riverdale Hospital* award, *supra*, there

was evaluation of the performance of the individuals in question by the hospital staff and there was a clause in the collective agreement purporting to give job security to members of the bargaining unit.

31. With respect to the application under section 1(4) of the Act these respondents argue that the business of Kennedy Lodge is to provide food and shelter together with medical care to its clients while the business of Drake International, of which Medox is a division, is to provide a wide range of personal services and, therefore, the nature of the business or profit-making activities of the two are entirely different and distinct. It is submitted that no finding can be made on the evidence that either entity functionally controls or directs the other entity. These respondents submit that on the evidence, functions pertaining to personnel policies, salaries, scheduling, and discipline of health care aides will be in the exclusive domain of Medox. Applying the criteria set out in *Re Walter's Lithographing Company Limited*, [1971] OLRB Rep. July 406 these respondents submit that a finding of common control or direction under section 1(4) of the Act cannot be made. It is further submitted that the facts in this case lack the "economic and organizational imbalance" between the firms that was found in the *Normick* case, *supra*. It is submitted that *Charming Hostess Inc.*, *supra*, is the most analogous to the facts at hand. It is submitted that Drake International Inc. (Medox) functions independently and economically apart from Kennedy Lodge Nursing Home Inc.

32. Insofar as it is claimed that the persons to be supplied will be employees of Kennedy Lodge, these respondents rely on *York Condominium Corporation*, [1977] OLRB Rep. Oct. 642, *Templet Services*, [1974] OLRB Rep. Sept. 606, *Ralston Purina Canada Inc.*, [1979] OLRB Rep. June 552 and *Sutton Place Hotel*, [1980] OLRB Rep. Oct. 1538 as standing for the proposition that the employer is the entity exercising fundamental control over the employment relationship. In the face of evidence which establishes that Medox screens the job applicants, provides an orientation package, maintains job descriptions, provides those assigned to Kennedy Lodge with a Medox name tag and issues paycheques and slips, these respondents maintain that Medox would be seen as the employer. When reference is had to the evidence that Medox will be responsible for discipline, for determining the level of wages and that the job is essentially routine, it is submitted that Medox will enjoy effective control and is, therefore, the real employer.

33. The respondent Medox makes essentially the same argument as the respondents Kennedy Lodge, Daynes Health Care, and Daynes in respect of the identification of the employer. Although acknowledging that Kennedy Lodge will have the right to refuse to permit any given Medox employee to work in the Nursing Home, the respondent Medox relies on the evidence of Mr. Butler that Medox will investigate the reasons underlying the Home's rejection of the employee and, depending on the results of the investigation, will either transfer the employee to another facility or home care, or discipline or discharge. Furthermore, while also acknowledging that the Kennedy Lodge charge nurses will remain responsible for the medical care of the residents, Medox relies on the evidence that the charge nurse will be relieved of administrative tasks relating to the aides such as the authorizing of time off, discipline and "more generally the supervision of the aides." The respondent Medox cites *Sutton Place Hotel*, *supra*, *The Tower Company (1961) Ltd.*, [1979] OLRB Rep. June 583 and *Ford Motor Co. of Canada Ltd. and Plant Guard Workers*, (1981) 1 L.A.C.

(3d) 141 (McDowell) in support of its position that on the evidence in this case Medox will be perceived as the employer by the individuals assigned to Kennedy Lodge and will exercise fundamental control over these individuals. The respondent Medox maintains that *K Mart, supra*, is distinguishable from the case at hand because in this case Medox will be responsible for the hands-on direction and supervision of the individuals assigned to Kennedy Lodge, will schedule and determine the hours of these individuals, will grant casual time off, will determine if rotation between departments will take place, will discipline these individuals and will invoice Kennedy Lodge monthly and not, as in *K Mart, supra*, immediately for each hour worked. Medox submits that if the contract is such that the degree of supervision required in practice is significantly greater than currently intended so as to render the contract uneconomical to Medox, Medox would either attempt to renegotiate the hourly rate or terminate the contract on 30 days' notice.

34. The respondent Medox states that the regulations under the *Nursing Home Act* do not in any way affect the issues to be determined in that relief staff from personnel agencies have been used in the past as charge nurses without it ever being suggested that such a practice was contrary to the regulations. In any event, it is submitted that there is no requirement that the extended care supervision to be provided by an R.N. or R.N.A. must be provided by an employee of Kennedy Lodge. It is pointed out that there is no requirement in the definition of "nursing staff" in section 1 of the Regulations that there be an employment relationship with the nursing home. Finally, it is submitted that there is nothing in the Act or Regulations that prohibits the Director of Nursing from delegating her responsibilities under section 60 of the Regulations to R.N.'s or aides employed by Medox.

35. The respondent Medox, in addressing the application under section 1(4) of the Act, acknowledges that Drake, through its Medox division, would be engaged in an associated or related activity with Kennedy Lodge if the contracting out was to proceed. Medox submits, however, that the section must be interpreted as requiring common control or direction of the entities themselves (i.e. Drake and Kennedy Lodge) and, therefore, it is submitted that the question of whether the specific activities of the entities are carried on under common control or direction is not critical to the section 1(4) determination. The respondent Medox, also relying on the criteria set out in *Walter's Lithographing Company Limited, supra*, argues that in the absence of common ownership, financial control or management of the corporations, there is no common control. Although conceding that the work to be performed by Medox will have to be integrated with the other work performed at Kennedy Lodge, it is submitted that this is inherent in any "contracting in" situation and that such integration falls well short of establishing common control and direction of the businesses. The *J. H. Normick case, supra*, is distinguished on the basis that the subcontractor in this case will not be wholly dependent in an economic sense and that the other party will not maintain *de facto* operational and economic control over the activities to be performed. The respondent submits that there are striking similarities between the relationship of the two entities in *Charming Hostess, supra*, and the relationship of the two entities in this case and asks the Board to make the same finding in this case. *Complete Car Care Centre, supra* is also commended to the Board. It is submitted that the Regulations under the *Nursing Home Act* are irrelevant to our determination and cannot be relied upon by the applicant/complainant in support of a finding of common control. Similarly, it is submitted that standards required

of registered nurses by the College of Nurses of Ontario indicate that a registered nurse may delegate responsibilities to nurse's aides which would include delegation to or from the registered nurse employed as a supervisor by Medox. As regards the Board's discretion to issue a declaration under section 1(4), it is submitted that such discretion should not be exercised in favour of the union if for no other reason than because the union is attempting to use section 1(4) to avoid the consequences of article 2.03 of the collective agreement and to obtain the benefit of a prohibition against contracting out without having to make any concessions at the bargaining table.

36. The respondent Medox argues in response to the alleged violation of sections 64 and 66 of the Act that there is no evidence that Medox has violated section 66 of the Act or section 64 of the Act insofar as it may be alleged that it acted with an anti-union motive. Insofar as the applicant/complainant argues that the effect of the contracting out is enough to trigger the protections of section 64 of the Act, Medox maintains that there is no evidence that it has engaged in a conspiracy with Kennedy Lodge to defeat bargaining rights (of the type found in *Plastics CMP Limited*, [1982] OLRB Rep. May 726) as would allow the Board to make a finding of a section 64 violation against it. Medox commends *Kennedy Lodge Nursing Home, supra*, and *Heritage Nursing Home Limited, supra*, to the Board as setting out the proper approach to be taken in the case of contracting out for legitimate business reasons. Finally, it is submitted that Medox should not be considered as a "person acting on behalf of an employer" within the meaning of sections 64 and section 66 of the Act in circumstances where it is merely pursuing its own legitimate business interests without any knowledge whatsoever of improper motivation on the part of Kennedy Lodge.

37. By way of reply argument Medox points to the failure of the applicant/complainant to have distinguished *Kennedy Lodge Nursing Home, supra*, and *Heritage Nursing Home Limited, supra*. Medox also points to the collective agreement between the union and Kennedy Lodge and maintains that acceptance of the union's argument would destroy the delicate balance of rights and obligations (as between Kennedy's obligation to pay the wage rates contained therein and its right to contract out). Within the meaning of the *Westinghouse* decision *supra* it is argued that the decision to contract out cannot be taken to have been made "to defeat legitimate collective bargaining aspirations" when the parties to the collective agreement and the employees covered by it have known all along, by virtue of article 2.03 of the collective agreement, that contracting out was a real possibility. In any event, it is submitted that Medox has considerable expertise so that the benefits accruing to Kennedy under the contract go beyond the mere saving of wages. The respondent Medox asks the Board to carefully read the *International Wall Coverings* case, *supra*, relied upon by the union especially the conclusion in that case that a non-motive approach to section 64 of the Act should be reserved for instances of clear mistake or for discipline clearly out of all proportion to the misconduct in issue. In any event, even if a balancing approach is adopted, it is the position of Medox that where a failure to contract out will result in bankruptcy and the loss of employment of all the employees of Kennedy Lodge and the loss of a place of residence for the residents, the balancing should be done in favour of the decision that was made.

38. Kennedy Lodge Limited Partnership appeared as a party and was represented by separate counsel in these proceedings. The Board received from counsel

for the limited partnership thorough and well reasoned submissions. However, other than for the few comments that follow, it is not necessary to detail the arguments made as, for the most part, they have been dealt with in the submissions of Kennedy Lodge and Medox. It is to be observed that Kennedy Lodge Limited Partnership relies on *Diversey (Canada) Limited*, [1978] OLRB Rep. Sept. 814 in support of the proposition that section 1(4) is not intended to bind independent or unrelated enterprises. The respondent Kennedy Lodge Limited Partnership emphasizes that where, as in this case, the evidence establishes that the business entity will go into bankruptcy if it does not take a business decision to cut costs, it is acting in response to an economic crisis within the meaning of the *Westinghouse* decision, *supra* and therefore, it cannot be said that it is acting to avoid the trade union. It is submitted that if an employer is not permitted to contract out for reasons of economic survival, as distinct from an attempt to simply improve profits, the right of an employer to reasonably conduct his business means nothing. Finally, it is submitted in its reply argument that the *Amplitrol Electronics Limited* arbitration award relied upon by the union can and should be distinguished on the basis of Medox's different methods of supervision, training, timekeeping, pay methods, clothing and identification, discipline, record-keeping, hiring and the perception of the individuals themselves.

DECISION

39. It is our intention to determine firstly, if we are dealing with a contracting out as contemplated by article 2.03 of the collective agreement or whether the work in question will continue to be performed by employees of Kennedy Lodge such that the terms and conditions of the collective agreement will apply and any attempt to circumvent the seniority and wage provisions of the collective agreement in respect of the performance of this work will constitute a breach of section 50 of the Act and consequentially a breach of section 64 of the Act and thereby bring into play the remedial authority of the Board. It is our intention to then determine, in the alternative, whether Kennedy Lodge and Medox will constitute related employers under the terms of the arrangement between them in respect of the activities carried on in connection with the provision of nursing care at Kennedy Lodge. If they are and the Board chooses to exercise its discretion to issue a section 1(4) declaration, the same result will obtain as would be the case if Kennedy Lodge was found to be the employer; that is, the collective agreement between Kennedy Lodge and the applicant/complainant trade union will apply and any attempt to circumvent the seniority and wage provisions in respect of the performance of this work will constitute a breach of sections 50 and 64 of the Act. It is only after having examined the structure of the arrangement that is to be put in place, both from the perspective of whether Kennedy Lodge remains as the employer and from the perspective of whether Kennedy Lodge will operate with Medox as a related employer, that we intend to examine the motivation behind the arrangement vis-a-vis the prohibitions in the Act against acting for anti-union reasons.

40. Article 2.03 of the collective agreement, the clause that gives Kennedy Lodge the right to contract out where it considers necessary, does not provide a complete answer to the legality of the actions contemplated by Kennedy Lodge in this case, as is argued by the respondents. In the face of the seniority, wage rate and recognition provisions of the collective agreement, it could never have been intended by the parties in agreeing to article 2.03 that Kennedy Lodge could rely on the clause

and at the same time remain as the employer of those contracted to perform bargaining unit work in place of the existing bargaining unit employees. Assuming no anti-union motivation, the clause enables Kennedy Lodge to contract to have work performed by the employees of another employer. It cannot be read as permitting Kennedy Lodge to enter into an arrangement under which the only change to its organization is that its unionized employees are replaced by non-union employees. The first question to be determined, therefore, is who will be the employer of the nurse's aides supplied by Medox?

41. Before proceeding further it is useful to establish the statutory basis upon which we make this inquiry. The applicant/complainant relies upon section 106(2) of the Act and upon section 50 in asking us to make the aforementioned inquiry in order to identify who will be the employer of the aides supplied by Medox. While the Board has not used section 106(2) of the Act to determine whether a person is an employee within the meaning of a recognition clause in a collective agreement, the Board has made it clear in a number of decisions that section 106(2) empowers it not only to decide whether a person is an employee within the meaning of the Act, but also whether a person is an employee of the employer who is a party to the application or complaint before it. (See *Re Ontario Hydro*, [1981] OLRB Rep. July 931 and the decisions referred to in paragraph 12 of that decision). Furthermore, although the Board has a long history of deferring to arbitration in matters of contract interpretation, the Board has, in recent years, as a result of its expanded remedial authority and policy responsibilities, refused to defer to arbitration where the alleged violation of the collective agreement would, if proven, constitute a repudiation of the collective agreement or involve, as well, violations of the Act. (See *K Mart Limited*, [1983] OLRB Rep. May 649, *Nelson Quarry* [1983] OLRB Rep. Sept. 1531 *Dufferin Aggregates*, [1983] OLRB Rep. July 1031.) In disposing of this type of case, therefore, the Board may rely on section 50 of the Act in addition to the unfair labour practice sections of the Act. (See *Re Maple Leaf Taxi Limited, supra, Carroll Electric, supra*, at page 1289.) Inherent in the Board's authority to determine if a party has breached a binding collective agreement contrary to section 50 of the Act is the authority to determine if certain persons are employees covered by that agreement.

42. The authority to identify the employer is also inherent in the Board's authority to define bargaining units and to measure union support in a certification application. In *York Condominium Corporation, supra*, a certification case, the Board isolated seven factors to assist it in determining which of two or more entities is the employer for the purposes of the *Labour Relations Act*. These are:

- (1) The party exercising direction and control over the employees performing the work.
- (2) The party bearing the burden of remuneration.
- (3) The party imposing discipline.
- (4) The party hiring the employees.
- (5) The party with the authority to dismiss the employees.

- (6) The party which is perceived to be the employer by the employees.
- (7) The existence of an intention to create the relationship of employer-employee.

The Board was careful not to rank these criteria but rather, made it clear that each must be considered and assessed on the particular facts of the case. There are a number of certification cases in which the Board has applied these criteria, or variations of them, in identifying the employer. (See *Re Ralston Purina Canada Inc.*, *supra*, *Sutton Place Hotel*, *supra*, *The Tower Company (1961) Ltd.*, *supra*, *Templet Services*, *supra*, and *Welland County Roman Catholic Separate School Board*, [1972] OLRB Rep. Oct. 884.) While in all of these cases, regardless of the outcome, the Board has attempted to weigh the relative importance of each factor having regard to all of the surrounding circumstances, the Board made it clear in *Sutton Place*, *supra*, that the object of the exercise is to identify, for labour relations purposes, the party exercising "fundamental control over the working lives and the working environment of those in dispute." The Board said in that case:

43. The weight to be accorded the various indicia of employer status set out in *York Condominium* cannot be assigned in a vacuum. When one of the factors is combined with another in the hands of one company, the Board may conclude that they accurately identify the employer, though while standing alone or in some other combination they may not. The significance of each indicator can only be ascertained through an appreciation of how they all fit together within the facts of each case. It is only then that the Board can decide which factors in the particular case most accurately reflect and identify the employer for collective bargaining purposes.

44. A particularly important question answerable through an evaluation of all of the factors set out in *York Condominium* is who exercises fundamental control over the employees. In some cases control over hiring may reflect fundamental control. In other situations, reminiscent of a hiring hall, it may not. In some cases day-to-day supervision may suggest fundamental control, in others it may not. Similarly with the payment of wages: in the factual mix of some cases the payment of wages may, along with other factors, suggest who holds the fundamental control while in other cases it may be of minor significance. No single factor listed in *York Condominium* inevitably points to the possession of fundamental control. The Board's ultimate evaluation of who holds fundamental control in any particular fact situation, however, is generally the single most determinative question in identifying the employer. In a word, to find the seat of fundamental control is generally to find the employer for the purposes of the *Labour Relations Act*.

(See also *Ford Motor Company of Canada*, (1981) 11 L.A.C. (3d) 141 (McDowell).)

43. The Board's decision in *K Mart*, *supra*, is instructive for our purposes because in that case the Board had to determine if individuals who had been supplied to work in a K Mart warehouse by an agency were in fact employees of K Mart and, therefore, entitled to grieve under the collective agreement in effect between K Mart and the union and to be protected under the Act from reprisals for having exercised the right to grieve. In reviewing the cases that we have cited in the previous paragraph the Board, in that case, concluded that:

... The cases have generally not assigned any particular order or priority to those factors, but rather have tended to indicate that the weight to be given to each factor must depend upon the facts of each case. However, the Board has tended to attach considerable significance to "overriding control" in determining which of two or more entities is the employer of certain persons. Moreover, the Board has consistently found that neither private arrangements as to who is the employer, nor administrative paymaster arrangements, are indicative of the true employer.

In determining that K Mart was the employer, the Board analyzed the factual context in the following terms:

In the present case the respondent exercises a high degree of control over the workers in question. The respondent's supervisors not only tell them what tasks they are to perform, but also direct them in the manner in which they are to be performed. It is the respondent which determines what hours will be worked by those workers at its premises, when they will take their breaks, and when they will eat lunch. Although the particular workers to be assigned to the respondent's premises are initially determined by the various employment agencies as the respondent's agents, it is the respondent which makes the ultimate determination concerning whether an individual will be permitted to continue to work at the Centre or will be discontinued or replaced. Thus, the respondent exercises substantial control over those workers, similar in many respects to the control which it exercises over regular full-time K Mart employees. Although the agencies serve as paymasters for K Mart in respect to the workers which they supply to the Centre, it is the respondent that bears the ultimate burden of their remuneration: as indicated above, after paying the workers, the agencies immediately invoice K Mart for each hour of work performed by them at the Centre. The evidence concerning imposition of discipline is of little assistance to the Board in resolving this matter since little or no disciplinary action is taken against any of the employees in question by either the respondent or the agencies. Instead of using any form of progressive discipline, the respondent simply removes any unsatisfactory agency worker from the Centre through a direction that the agency cease referring that person to the respondent's premises. That removal is tantamount to a discharge vis-a-vis the respondent, although the individual in question may thereafter be assigned by the agency to provide services to another client. Thus, the respondent clearly has the authority to direct that any of the employees in question cease working at its premises.

The Board went on to comment that perception and intention are not conclusive criteria where an employer has structured its affairs in a manner designed to avoid collective bargaining obligations in respect of a substantial number of individuals doing bargaining unit work on its premises. The Board also commented that because collective bargaining has an economic impact, "cost saving" is not, in and of itself, a valid defence to such a restructuring of the business.

44. The issue of who is the employer under a collective agreement where a purported subcontract arrangement is entered into has been extensively dealt with in grievance arbitration. The analysis and approach taken in the arbitration cases, because it has been made in the context

of an ongoing collective bargaining relationship, is particularly relevant to the matter at hand. In *Amplitrol Electronics Limited*, *supra*, security guards were provided by an independent supplier to Amplitrol. The supplier paid the employees' wages, supervised them by periodic visits and relayed instructions to them from Amplitrol. In finding that Amplitrol was the employer Prof. Weiler looked to the following factors:

- (a) the contract itself provided for a fixed hourly rate, with a relatively fixed mark-up for profit purpose;
- (b) The equipment and premises used were those of Amplitrol.
- (c) while the security guards were visited by the supplier's inspectors and reported to them, the job itself involved the application of certain standards prescribed by Amplitrol;
- (d) there was no evidence of significant independent control function by the inspectors;
- (e) if Amplitrol did not like the manner in which a routine was performed, it advised the inspector or employee involved, and if Amplitrol wanted a particular employee taken off the job, he was removed;
- (f) the inspectors were not at all times on the premises, unlike the managerial employees of Amplitrol.

In response to Amplitrol's argument that there was no other way that the subcontractor could be retained, arbitrator Weiler reasoned as follows:

However, this contention misses the whole point and significance of the requirement and its tests. When an employer negotiates an agreement with a union, he accepts certain standards by which his employment relations will be governed. He is permitted to exclude certain work from the operation of these standards if he arranges to have it performed by men who are employed by another company. *However, his obligation to respect the agreement in connection with his own employees cannot be avoided by the simple colourable device of saying that certain men are not his employees. These men must really be someone else's employees, not his own*, and, to this end, the law has established certain tests for determining when the employment relations exists.

Hence, there is nothing incongruous about the Company being unable to achieve its subcontract in this case. It wants to have certain men working continuously on its premises, operating its equipment, under routine standards or specific instructions which largely stem from its own supervision, and paid for out of a fund of hourly payments which is closely related to the hourly wages of these men. At the same time, it wants these men not to be considered its employees so that it need not respect the collective agreement it has freely negotiated and accepted. Unfortunately it cannot 'have its cake and eat it too'. It must make real organizational and operational changes which are consistent with the actual performance of the work

by another company or see itself become the actual employer of men the latter merely supplies. Up to now, the changes have been quite marginal and we must find that the present monitors have been employees of Ampli-trol. To use them instead of the grievors is to be in breach of the seniority provision and requires immediate restoration and compensation of the latter.

(emphasis added)

45. In *Riverdale Hospital*, (1974) 7 L.A.C. (2d) 40 (Schiff) registered nurses and registered nursing assistants were provided by an outside agency (Medox) to the Hospital. The facts in that case are set out at page 41 of the award as follows:

... The Hospital does not ask the agencies for any particular person by name; rather it orders them to send registered nurses and nursing assistants to fill stated numbers of shifts. Personnel who are sent in this way wear their own uniforms and exercise their professional skills gained through their previous professional education and experience. The Hospital does not directly remunerate them, nor has it purported to suspend or discharge any. On the other hand, the Hospital's senior supervisory staff evaluate the job performance of the nurses and assistants sent by the agencies and inform the agencies about who has proved satisfactory and who the Hospital will not accept again. As a result, certain nurses have not returned after a first experience but the agencies have sent others on a regular basis. While the agency personnel all supply their own uniforms, the same is true of nurses and nursing assistants the Hospital permanently employs. Moreover, and this is particularly important, nurses and nursing assistants sent by the agencies are integrated identically with their permanently-employed counterparts into the on-going, detailed routine of the Hospital for providing around-the-clock nursing care to the patients on the Hospital's premises and with the Hospital's facilities and equipment. Indeed, as far as the senior officials of the Hospital and the permanent nursing staff are concerned, once a nurse or nursing assistant arrives to work — be she a permanent employee or someone sent by an agency — she performs the nursing functions for which she has been trained subject always to the policies and procedures of the Hospital and to the supervision from the Hospital's head nurses and supervisors appropriate to her category.

The arbitrator, in concluding that the persons in dispute were employees of the Hospital, analyzed the relevant arbitral jurisprudence as follows:

As these awards reveal, in almost all arbitrations of grievances similar to that presented here, arbitrators have determined whether a person is the employee of the party-employer by weighing in the context of the particular situation the relative importance of four factors: the party-employer's control over the person's performance of the job, the ownership of the tools used, who has the chance of profit from the work, and who bears the risk of loss. In many arbitrations the last two factors have been unimportant while the factor of "control" has been decisive. To weigh the significance of control arbitrators have assessed the degree of the party-employer's right to direct the person's job performance appropriate to the nature of the particular job

and the person's skill. In many awards, the party-employer did not choose the person, did not pay him directly and did not purport to discipline him on the spot. Nevertheless, arbitrators defined the person as an employee if he performed the job with the party-employer's materials on the party-employer's premises with the party-employer exercising to a substantial degree the right to direct the job performance.

46. Similarly, in *Regional Municipality of Waterloo*, (1977) 16 L.A.C. (2d) 280 (Brandt), the arbitrator found that an individual referred to the Sunnyside Home for the Aged by an outside agency on an hourly rate basis to replace a bargaining unit employee, was an employee of the Home. The Board in that case concluded as follows:

It is clear that in the instant case all the elements of control which were present in the *Riverdale Hospital* case are also present here. Indeed the instant case is even stronger in that the sense in which the employer herein had the power to discipline is more direct than in the *Riverdale Hospital* case. As indicated above all that the employer herein need do if dissatisfied with someone supplied by the agency is to communicate that fact to the agency and the relationship would be terminated forthwith. In effect, the arrangement between the employer and the agency is one wherein the agency becomes the agent of the employer in regard to the termination of the services of unsatisfactory personnel. We therefore do not need to consider in this case the issue as to whether or not the element of control requires more than a mere power to issue daily work assignments and must extend to include a power to discipline and ultimately to discharge. Even on a strict view as to the meaning of "control" the test would, in this case, be met.

(See also *Goodyear Tire and Rubber Company*, *supra*, and *Hydro Electric Power Commission of Ontario*, (1971) 23 L.A.C. 111 (Weatherill) and *Thompson House*, (May 18, 1984), unreported, (P. Picher).)

47. In this case the respondents rely on the fact that Drake International and Medox, a division of Drake International, are wholly separate and independent entities from Kennedy Lodge and that it is Medox that screens and selects the persons in dispute, provides orientation, maintains job descriptions, will schedule, assign and supervise the work through the full-time Medox supervisor and, also through the same full-time Medox supervisor, will be responsible for the discipline of these persons. The respondents also rely on the fact that these persons will wear Medox name tags and will be paid by Medox on the basis of wage rates established by Medox. Having regard to these facts the respondents argue that Medox will be perceived to be the employer and will enjoy effective and fundamental control over the employment relationship and, therefore, should be found to be the employer.

48. On a one-dimensional analysis we might be persuaded to agree that Medox is the employer of these persons. However, when we place the proposed arrangement in context and contrast, from the perspective of the Kennedy Lodge organization, what has been with what is intended to be, we are forced to a different conclusion. Where there has been a pre-existing collective bargaining relationship, as in this case, and where, also as in this case, the employer party to that relationship has chosen to utilize persons who are ostensibly non-bargaining unit employees to perform the same functions at the same work stations as had previously been performed by bargaining unit employees, we must also assess the nature of the arrangement

put in place to accomplish this result from the perspective of the employer party to the collective agreement. It is the employer party to the collective agreement that relies on his right to contract out part of his organization and we must determine if this is really what he has done.

49. The work in dispute is hands-on nursing care which is the core activity of Kennedy Lodge and has heretofore been performed by nurse's aides employed by Kennedy Lodge under its collective agreement with the union. Where the nurse's aides form a part of the health care team (see regulations under the *Nursing Home Act* and the Kennedy Lodge job descriptions) and where their function is to provide hands-on nursing care in the form of bathing, grooming, feeding, walking etc., we do not accept that a meaningful differentiation can be made between control over nursing care generally and control over the employment of the nurse's aides who provide an important part of this nursing care, as it appears has been attempted in the contract between Medox and Kennedy Lodge. The task that falls to the Board is to assess the substance of the arrangement, as distinct from its form, as it will be carried out within the Kennedy Lodge premises and against the backdrop of the existing collective bargaining relationship.

50. The aides employed by Kennedy Lodge have been subject to the policies and procedures laid down by Kennedy Lodge in the running of its Home and have been directly supervised by charge nurses (on a 4.5 to 1 ratio) in the employ of Kennedy Lodge. On the evidence, the Kennedy Lodge organization, including all of the charge nurses, the nursing supervisors and the Director of Nursing, will remain intact except for the replacement of the 92 nurse's aides who are presently employed by 92 nurse's aides from outside and a single on-site supervisor. Furthermore, on the evidence, Kennedy Lodge will continue to establish policies and procedures under which nursing care is provided in the Home — the same resident care policies and procedures under which the aides provided by Medox will work. Kennedy Lodge, in compliance with the *Nursing Homes Act*, will continue to determine the number of aides required within the Home. Finally, on the evidence of Messrs. Daynes and Butler it is clear that Kennedy Lodge will continue to enjoy the ultimate authority with respect to having any unsatisfactory aide removed from Kennedy Lodge. The authority of Medox to reassign an aide found unsatisfactory by Kennedy Lodge is irrelevant to our determination. The aides supplied by Medox will continue to be under the direct supervision of the Kennedy Lodge charge nurse who will continue to make reports, prepare the care plans for each patient and monitor the day-to-day work of the aides. Indeed, it is acknowledged that it is the charge nurses who will report any occurrences involving a Medox aide to the Medox supervisor. Furthermore, under regulations 60(1)(a) and (b) the Director of Nurses, who is a Kennedy Lodge employee, is responsible for "the organization, direction and evaluation of nursing care" and "directing the work of the nursing staff in the nursing home". In the context of an arrangement under which the Kennedy Lodge organization will remain intact, under which Kennedy Lodge, through its charge nurses, will continue to provide direct supervision to the aides and will maintain overriding authority in the form of its power to make the policies and procedures under which the aides will work and to have any unsatisfactory aide removed from Kennedy Lodge, we do not attach a great deal of significance to the role played by the Medox supervisor. Indeed, it is not physically possible for a single person to provide direct hands-on supervision over the 92 aides working in the home and, as we have observed, under the regulations ultimate authority rests with the Kennedy Lodge Director of Nursing. Finally, under the terms of an arrangement that requires payment by Kennedy Lodge on the basis of the number of hours worked by the aides in the Home, we must conclude that Kennedy Lodge continues to bear the burden of the remuneration in respect of the aides supplied by Medox.

51. Applying the primary test developed in both the Board and the arbitral jurisprudence, and relying on substance over form, we are satisfied that Kennedy Lodge will maintain “fundamental control” over the employment of the aides working at the Kennedy Lodge Nursing Home. Indeed, given the nature of Kennedy Lodge’s business, the care of the elderly, and the regulations which govern it, it would be difficult to conceive of circumstances under which the employment of persons providing any part of the hands-on care of patients carried on in the Home would not be under the fundamental control of the owner of the Home. The fact that many of the functions performed by the nurse’s aides are routine in nature does not detract from the importance to be attached to the identification of who provides direct supervision of and maintains ultimate authority over those who provide this hands-on care. In this case the evidence points conclusively to Kennedy Lodge and accordingly, we hereby find (in contrast to the finding made in *Re Preston Springs Gardens Retirement Home and Health Office and Professional Employees Local 206* (June 5, 1984), unreported, (Lerner)) that Kennedy Lodge would be the employer of these aides and that the arrangement with Medox is not a contracting out within the meaning of article 2.03 of the collective agreement. In these circumstances an attempt to employ outside aides in preference to those with established seniority rights under the subsisting collective agreement with the applicant/complainant trade union, would constitute a serious breach of the collective agreement and of sections 50 and 64 of the Act and we hereby so find.

52. If we are somehow wrong in focusing on the Kennedy Lodge organization and in concluding that the arrangement between Kennedy Lodge and Medox will not result in a “contracting out” within the meaning of the collective agreement and that Kennedy Lodge will exercise “fundamental control” over and will continue to be the employer of the aides working on its premises, we are satisfied in the alternative that Kennedy Lodge and Medox, in respect of the activities carried out by the aides in the provision of hands-on nursing care at Kennedy Lodge, are related employers within the meaning of section 1(4) of the Act.

53. The purpose of section 1(4) of the Act is aptly summarized in *Brant Erecting and Hoisting Limited*, [1980] OLRB Rep. July 945 as follows:

Section 1(4) was enacted in 1971 and deals with situations where the economic activity giving rise to employment or collective bargaining relationships regulated by the Act, is carried out by, or through more than one legal entity. Where such legal entities carry on related business activities under common control or direction, the Board is empowered to pierce the corporate veil. Section 1(4) ensures that the institutional rights of a trade union, and the contractual rights of its members, will attach to a definable commercial activity, rather than the legal vehicle(s) through which that activity is carried on. Legal form is not permitted to dictate or fragment a collective bargaining structure; nor will alterations in legal form undermine established bargaining rights.

We reject the suggestion that the section must be interpreted as requiring common control or direction of the corporate entities (Drake and Kennedy Lodge in this case) and that the question of whether the specific activities carried on by these entities are under common control or direction is not critical to a section 1(4) determination. The plain language of the section, which speaks in terms of “activities or businesses” evidences a contrary legislative intention and furthermore, in that it is specific activities that give rise to employment, the purpose of the section would not be well served by such an interpretation. The Board made it clear in *J. H.*

Normick Inc., *supra*, that the common control and direction referred to in the section relate to activities as well as businesses and that functional interdependence as well as corporate interrelationships must be considered. The Board stated in that case:

14. The section extends to cover not only related business but related activities as well. The Board, therefore, is not restricted to considering corporate interrelationships but must also look to functional interdependence in determining if two or more entities are related within the meaning of the section. The second pre-condition to the issuance of a declaration is that the Board find that the related entities are 'under common control or direction'. In so far as 'direction' refers to the impact of personal or corporate authority, the Board must also look to whatever contractual arrangements exist and to the economic reality in deciding *if the related activities or businesses are under common 'control'*

(emphasis added)

and went on to comment:

21. Section 1(4) recognizes that the business activities which give rise to the employer-employee relationships regulated by the Act, can be carried on through a variety of legal vehicles or arrangements; and it may not make 'industrial relations sense' to allow the form of such arrangements to dictate, and possibly fragment, the collective bargaining structure. In order to have orderly and stable collective bargaining, the bargaining structure must have some permanence and accord with underlying economic and industrial relations realities. Where two employers are nominally independent but are functionally and economically integrated, the essential community of interest between them and the employees employed by one or both of them may make it appropriate to treat them as one employer for some or all collective bargaining purposes. This is not to say, however, that common economic control of related business activities will automatically cause the Board to issue a section 1(4) declaration. The Board having satisfied itself that the businesses or activities before it are under common control or direction, is given a discretion as to whether or not to issue a section 1(4) declaration. If the scheme of the Act would be better served or the collective bargaining structures placed on a sounder footing by refusing to make a section 1(4) declaration the Board will exercise its discretion accordingly. (See *Zaph Construction Ltd.* [1976] OLRB Rep. Nov. 741 and *Ellwall and Sons Construction Limited* [1978] OLRB Rep. June 535.) In view of the broad language of the section which extends to cover such a wide range of business relationships, the labour relations considerations which govern the exercise of the Board's discretion are paramount in determining whether the Board should declare two or more businesses or activities to be one employer for purposes of the *Labour Relations Act*.

54. The respondents rely on *Charming Hostess*, *supra* and *Complete Car Care Centre*, *supra*, two cases in which the Board dealt with subcontracting arrangements under section 1(4) of the Act. In *Charming Hostess* Molson's Brewery contracted with two companies to staff and operate a hospitality suite on the brewery premises. There was no other connection

between Molson's and the subcontractors. The subcontractor who undertook to provide the food service had full responsibility for the employment and supervision of its personnel. Molson's paid the subcontractors a management fee together with a sum based on the number of hours worked by the subcontractor's employees and provided the kitchen facilities and equipment. The contract was for one year terminable on notice. The Board had this to say:

Section 1(4) does impose some limits on the degree to which an employer can avoid its obligations under a collective agreement by substituting the employees of another employer for its own — even though the arrangement may not have been undertaken for the purpose of subverting bargaining rights (in which case unfair labour practice considerations might also arise). This is especially the case where the functions performed by the employees of the other employer are carried out on the first employer's premises, with the first employer's equipment, in conjunction with the work performed by the first employer's own employees, and subject to the first employer's overall direction and control. In the Great Atlantic and Pacific Company of Canada Limited, [1981] OLRB Rep. March 285, for example, legislation required "A & P" to create a new corporate vehicle to run the pharmacy department which it had established in its larger food stores. There was no anti-union motive, but the separate legal identity of the "drug company" was totally artificial from a collective bargaining point of view. And the Board issued a related employer declaration. The drug company was completely dominated by A & P and had no business activities apart from it. The fact that the drug company hired employees, paid them and directed them in their daily activities did not obscure the reality of the situation.

The union argues that the language of Section 1(4) is broad enough to cover a variety of sub-contracting arrangements — especially those which do not involve "contracting out", but which might more appropriately be described as "contracting in", or "labour only" sub-contracting. *Where A enters into a relationship with B whereby B comes into A's premises to perform functions to A's specifications formerly undertaken by A's own employees there will inevitably be what the Board in Metropolitan Parking Inc., [1979] OLRB Rep. Dec. 1193] described as a "symbiotic relationship" between the two business entities. The activities carried on by the two firms will be complementary. They will obviously and necessarily be "related" and efficiency will usually require that there be some degree of coordination, common control or direction.* That is the applicant's characterization of the situation in the instant case.

The Board accepts that there may be sub-contracting relationships which can be characterized as a form of joint venture and could fall within the ambit of Section 1(4). The Board adverted to that possibility in *Ontario 474619 Ltd.*, [[1982] OLRB Rep. Oct. 1452]. The more closely the purchaser of employee services controls when, where, how, by whom, and at what price the employee services are provided, the more the activities will appear to be under joint control or direction. *If at the same time the sub-contractor is effectively dominated by the purchaser and it appears that the notion of a sub-contract is introduced not to provide independent managerial and*

employee skills but rather a separate "non-union" corporate vehicle which permits the purchaser to have the samework performed in much the same way asbefore but beyond the ambit of its collective agreement, a Section 1(4) declaration might well be warranted. It was considerations such as these which appear to have prompted the Board to issue 1(4) declarations in *Donald A. Foley Limited*, [1980] OLRB Rep. Apr. 436, and *J. H. Normick Inc.*, [1979] OLRB Rep. Dec. 1176, even though there was no direct financial ownership of the sub-contractor in either case.

(emphasis added)

In finding that section 1(4) of the Act did not apply, the Board concluded:

... It is clear on the evidence that Charming and Amsterdam are independent businesses with their own established employee complement, operated for the benefit of their own principals, and providing their specialized services to a variety of purchasers of which Molsons is only one. Both businesses were in operation long before the Molsons contract, and, no doubt, they will continue thereafter. Neither is a mere shell or a device to avoid collective bargaining obligations, and neither can be regarded as an instrumentality of Molsons. We do not think the situation here falls within the intended ambit of Section 1(4).

55. Similarly, in *Re Complete Car Care Centre, supra*, the issue before the Board was whether an automobile dealership and its subcontractor for the washing and rustproofing of cars should be deemed to be one employer for purposes of the Act. There was no common ownership or management. The subcontractor leased part of the dealer's premises for its operations and received about 60% of its business from the dealer. However, the work was performed at a fixed price and the subcontractor would decide how the work was to be performed and by whom and supervise its own employees in the performance of the work. In deciding that section 1(4) did not apply the Board found:

19. In assessing the circumstances of the case before us, we consider it noteworthy that there is apparently an accepted practice in the automotive dealership field of contracting out the washing and rustproofing of cars. One can infer from this that the work involved is not viewed as being so integral or "core" to the operation of a dealership that the management of the dealership must keep direct control over the performance of the work. This is demonstrated by the practice of Central Chev. Olds. The firm contracts out the work to Complete Car Care at a fixed price, with Complete Car Care deciding how the work is to be performed and by whom. Complete Car Care supervises and pays its own employees. This is *not* a case where it can reasonably be said that Central Chev. Olds. is the true employer of the individuals performing the work, or that the two firms are being carried on under joint control or direction. In addition, Complete Car Care is not under the type of domination of Central Chev. Olds as would justify a section 1(4) declaration. Fully 40 per cent of Complete Car Care's work comes from other dealerships and from the London Public Utilities Commission, and the firm is currently seeking to expand its work from sources other than

Central Chev. Olds. In the result, we do not believe that this is the type of situation in which section 1(4) is applicable.

56. In contrast to the two cases referred to above, the activities with which we are concerned in this case form part of the core activity of Kennedy Lodge. It is one thing to contract out the performance of peripheral activities (a hospitality suite where brewing is the core activity or the washing and rustproofing of automobiles where the selling of cars is the core activity) over which fundamental control can be easily relinquished, as it was in those cases. It is much more difficult to relinquish fundamental control over the core activities of the business. If we are somehow mistaken in our conclusion that Kennedy Lodge retained fundamental control over the nursing activities carried out by the aides, then, at the very least, the evidence establishes that Kennedy Lodge and Medox share control over these activities, as they are carried on as part of Kennedy Lodge's business. The contract between Kennedy and Medox contemplates that there will be a significant degree of common control and direction, and, in addition, the policies and procedures laid down by Kennedy, the ongoing consultation between Kennedy and Medox and the conditions laid down in the regulations to the *Nursing Home Act* leave no doubt that the activity of Medox in supplying nursing aides to Kennedy Lodge and the activity of Kennedy Lodge in providing nursing care for its residents are related activities within the meaning of section 1(4) of the Act and are under common control within the meaning of the same section.

57. In deciding whether or not to exercise our discretion under section 1(4) of the Act, we are guided by the words of the Board in *Re Rivard Mechanical*, *supra*:

8. The first point to be commented on, in the above facts, is the extent of the emphasis placed by the respondents on the fact that what occurred here arose solely as a matter of economic survival. While the Board is not insensitive to such problems, it must be stated unequivocally that the *Labour Relations Act* nevertheless does not contemplate or permit the unilateral withdrawal by one party from its obligations under the Act, or the achievement of this end simply by choosing to carry on the same business in a different form. Indeed, the provisions of section 1(4) in particular were designed to eliminate such action. While the Board is given an important measure of discretion under section 1(4), to exercise that discretion on the basis that an employer party was unable to fulfill its legal obligations on a competitive basis would undermine the scheme of the Act, and the very provisions of section 1(4) itself. Counsel for Rivard Mechanical argues: 'There is not intent to interfere with the union but economic realities require that they must maintain a non-union operation'. Clearly nothing is more fundamentally destructive of a union's rights and interests than operating non-union, and 'economic realities' simply cannot be used to justify this.

The evidence supports the conclusion that the arrangement with Medox was entered into for no other reason than to allow Kennedy to replace its unionized employees with non-union employees and thereby to extricate itself from its collective bargaining obligations in respect of its aides and to thereby avoid having to pay the wages and benefits under the collective agreement. Indeed Mr. Daynes acknowledged as much. In these circumstances, a section 1(4) declaration is in order and accordingly, we hereby declare that Kennedy Lodge and Medox, a division of Drake International, are related employers within the meaning of the Act in respect of the activities carried on by the nursing aides at the Kennedy Lodge Nursing Home over

which they share common control. The employees performing these activities, therefore, are covered by the collective agreement between Kennedy Lodge and the applicant/complainant trade union and Kennedy Lodge and Medox are bound to it in respect of the performance of the work in question at Kennedy Lodge. While we are sympathetic to the financial difficulties faced by Kennedy Lodge, (although we do not agree that a financial crisis exists when the return to investors falls below 14%) the answer does not lie in a unilateral withdrawal from its collective bargaining obligations in respect of the 92 nurse's aides which it has heretofore employed.

58. Having determined that Kennedy Lodge will be the employer of the aides supplied by Medox, or alternatively that Kennedy Lodge and Medox, a division of Drake International, are related employers within the meaning of section 1(4) of the Act in respect of these activities, we do not have to go any further. However, we are of the view that some comment pertaining to the legality of the subcontracting arrangement that is the subject of this decision vis-a-vis the unfair labour practice provisions of the Act would be of assistance to the parties in structuring their affairs and to the nursing home industry generally where recent decisions to subcontract have generated a great deal of union/management friction.

59. We accept that Kennedy Lodge faces a serious financial crisis. Regardless of whether it can be said that this crisis is of Kennedy Lodge's own making, and in this regard we make no comment, the financial difficulties facing Kennedy Lodge are real and they are pressing. When reference is had to the size of the retroactive wage increases which were a cause of concern to Daynes and Northey immediately before the deal to purchase Kennedy Lodge was closed, to the size of the actual and projected operating losses facing the Home, to the projected savings in wage costs that would result from the subcontract, to the absence of any technological or organizational benefits accruing from the subcontract and indeed from the evidence of Mr. Daynes himself, there can be no doubt that the primary purpose of the arrangement, as we have found, is to allow Kennedy Lodge to extricate itself from the wage rate and benefit provisions of the collective agreement as they apply to nurse's aides and to thereby improve the financial position of the home. It is to be observed that although Kennedy engaged the union in discussion with respect to sick leave abuse, at no time did Kennedy advise the union that it needed additional relief in order to avoid insolvency.

60. The Board made reference to the inevitable economic impact of collective bargaining and to the prohibition against an employer acting for no other reason than to get out from under his legally imposed collective bargaining obligations in *Westinghouse, supra*. The Board said:

63. The purpose of the *Labour Relations Act* is to provide a statutory framework within which employees are encouraged to join together and bargain collectively with their employer. The underlying assumption is that employees who bargain collectively are on a more equal footing with their employer than unorganized employees and have a greater say in determining their terms and conditions of employment. It is axiomatic, therefore, that collective bargaining as established under the Act has an economic impact in terms of both the price of labour and the scope of the employer's unilateral authority. Under our Act the employees' share of the economic pie and the scope of management's authority vis-a-vis employee relations must be determined at the bargaining table and against the backdrop of possible economic sanctions by either side. An employer whose employees have decided to bargain collectively cannot escape his obligations under the *Labour Relations Act* and any decision taken to avoid these obligations or to defeat

legitimate collective bargaining aspirations of his employees is in violation of the Act. Under our statute accommodation is sought at the bargaining table. An employer who contracts out his work, relocates or closes his plant or takes any other major business decision to avoid having to deal with his employees collectively through a trade union or to avoid the possibility, in the abstract, of being subject to economic sanctions is guilty of an unfair labour practice and the Board has so found in a number of cases including *Academy of Medicine*, [[1972] OLRB Rep. Dec. 783], *Humber College*, *supra*, and *Consolidated Sand and Gravel*, [[1978] OLRB Rep. March 264].

Insofar as *Kennedy Lodge*, *supra* and *Heritage Nursing Home*, *supra*, may be read as standing for the proposition that so long as an employer can point to cost savings in justifying the business decision he has made, it cannot be found that he has breached the Act, we disagree.

61. This leads us to a discussion of subcontracting; an arrangement under which an employer contracts for certain services that he is already or could otherwise perform himself. Given the effect upon the employer's complement of employees, it is not difficult to understand why decisions to subcontract often generate a vigorous response from trade unions. However, it has long been accepted in the arbitral jurisprudence in this jurisdiction that, absent an express prohibition in the collective agreement, an employer is free to contract out. (See *Kennedy Lodge Nursing Home*, (1982) 28 L.A.C. (2d) 380 (Brunner) for the most recent review of the cases.) In this connection we have been careful to point out that in order to fit within this presumption and to be a proper exercise of management rights under a collective agreement the contracting out must be real, in the sense that the work in question is moved within the subcontractor's organization where it is performed by the subcontractor's employees. If the work is performed by the subcontractor's employees there will be no breach of a collective agreement which does not expressly prohibit contracting out. The essence of the argument put forward by the applicant/complainant in this matter is that, apart altogether from the collective agreement, a decision to subcontract, if undertaken for no other reason than to avoid the wage rates in the collective agreement, breaches the unfair labour practice provisions of the *Labour Relations Act*. If this is so an employer who contracts for security, janitorial, cafeteria or any number of other functions that are peripheral to the core activities of his business, because he can have these services performed less expensively by a subcontractor than under the collective agreement, would be in breach of the Act. This type of subcontracting arrangement, usually undertaken to reduce costs, has become quite common and it would surely come as a surprise to the community if we were to find that it was in breach of the Act. However, it would be no less of a surprise to the community if we were to find that a decision taken to use a subcontractor, in place of bargaining unit employees, to perform a part or all of the employer's core activity on the employer's premises utilizing the employer's equipment, and under the employer's control, as in this case, was not in breach of the unfair labour practice provisions of the Act.

62. Notwithstanding these perceptions, sections 64 and 66 of the Act contain specific prohibitions against acting for anti-union reasons that must be applied having regard to the underlying purpose of the Act. Given, on the one hand, the intended economic effect of collective bargaining and the clear prohibition against terminating or otherwise interfering with the employment opportunities of employees because they have chosen to bargain collectively, and, on the other hand, the freedom of an employer under section 77 of the Act to suspend or discontinue any part of his operation for cause in order to maintain or improve the competitive-

ness of the business, the Board is faced with a difficult task in ascertaining the true motive of the employer in the subcontracting cases. This is so because neither the reduction in costs nor the elimination of bargaining unit jobs in and of themselves point conclusively to anti-union motivation. It is to be observed as well that it is not likely that there will often be direct evidence of anti-union motivation in these cases. The Board therefore, will usually be required to draw inferences from the evidence as to true or real motive.

63. While each case must be decided on its own facts, and while no two cases will be the same, there are certain rebuttable inferences that can be drawn from the nature of the subcontracting arrangement itself. Where it is shown that under the subcontracting arrangement the employer retains control over the performance of the work and the employment relations of those who perform it, so that the persons performing the work are, in reality, the employees of that employer, and, as in this case, where they have replaced bargaining unit employees, an inference of anti-union motivation may readily be drawn. Where those performing the work that had previously been performed by members of the bargaining unit are in reality the employees of the employer, in the sense that the employer continues to control the performance of the work and the employment relations of those who perform it, an inference can easily be drawn that the employer has acted to replace his bargaining unit employees in order to undermine their collective bargaining rights. However, where control of this type is relinquished so that the work is performed by the employees of the subcontractor under the direction of the subcontractor's organization and utilizing the resources of that organization, the same inference does not necessarily arise. Indeed, in the absence of something more (for example, an express threat to contract out if certain rights under the Act are relied on) it is difficult to draw an adverse inference with respect to motive from the simple fact of a decision to enter into a genuine arm's length subcontracting arrangement.

64. It does not take a great deal of insight to recognize that it may be very difficult for an employer party to a collective bargaining relationship to relinquish control and thereby avoid having the Board draw a rebuttable inference that he has acted for anti-union motives where he contracts to have a core function or functions performed on his premises (i.e. "contracting in"). On the other hand, it will be less difficult for an employer to relinquish control and thereby avoid having the Board draw a rebuttable inference that he has breached the Act where he contracts to have peripheral functions (such as janitorial, security, cafeteria etc.) performed on his premises by a contractor. These peripheral functions, in contrast to the core functions of the business, are less critical to the successful running of the employer's business so that the employer may be more willing and is certainly in a better position to relinquish control over them. Similarly, it will be less difficult for an employer to relinquish control and thereby avoid having the Board draw a rebuttable inference that he has breached the Act where he contracts to have core functions performed off premises (i.e. "contracting out") utilizing the subcontractor's organization, capital, technology, and managerial expertise. In this latter situation the employer usually relinquishes control over the performance of the work and the employment relations of those who perform it so that it cannot readily be found, in the absence of something more, that the employer has simply replaced his bargaining unit employees with non-bargaining unit employees in an attempt to avoid his collective bargaining obligations.

65. In this case Kennedy Lodge has chosen to have a core function performed on its premises by a subcontractor with the resultant termination of a large number of bargaining unit employees. There can be no dispute that the provision of hands-on nursing care is a core function of Kennedy Lodge's business. We have found on an extensive analysis of the evidence that Kennedy Lodge will not relinquish control over the work or the employment relations of

those who will perform it. That analysis resulted in a finding that in reality Kennedy Lodge will continue to be the employer and indeed, as is obvious, there is a direct relationship between finding that those who perform the work under a subcontract are the employees of the employer and the drawing of an adverse inference as to the motive of the employer in entering into the arrangement which he has. Notwithstanding the very substantial cost-saving that would accrue to Kennedy Lodge under the terms of its arrangement with Medox, Kennedy Lodge must be presumed to have intended the consequences of its actions and in the absence of any evidence to suggest the contrary, we must draw an adverse inference as to motive and find that Kennedy Lodge terminated its bargaining unit employees in breach of sections 64 and 66 of the Act.

66. Finally, in *International Wallcoverings, supra*, the Board indicated that it would be prepared in appropriate circumstances to adopt a “non-motive approach to section 64”, such as in instances of “clear mistake” or “discipline clearly out of all proportion to the misconduct in issue”, where a clear imbalance in favour of protected activity exists. However, it is doubtful that this non-motive approach will be of assistance in deciding cases involving subcontracting since, as indicated above, where the persons performing the service for the employer under such contracts are, in reality, the employees of that employer, anti-union motivation can readily be inferred. Where, on the other hand, for purposes of economy and efficiency, control is relinquished so that work that had been performed by members of the bargaining unit is performed by the employees of a genuine arm’s length subcontractor, under the direction of the subcontractor’s organization and utilizing the resources of that organization, it would be difficult to find a clear imbalance in favour of protected activity.

67. Where then does this leave Kennedy Lodge in dealing with its financial difficulties? If the wage rates in the collective agreement are perceived as the root cause of an employer’s financial difficulties it is open to the employer to enter into full and open discussions (which did not take place in this case) with the union in an attempt to obtain some relief. While the union does not share the employer’s goal of maximizing profit and may well dispute that the provision of a 14% return to investors is a priority, it does have a very real interest in preserving the employment of its members through the continued operation of the business. It is also open to the employer to wait until the expiry of the agreement and to then press for relief in bargaining with the trade union. What the employer cannot do is replace his bargaining unit employees with non-union employees because they have or might exercise rights under the Act.

68. The Legislature in its wisdom has decided that the interest of society generally to uninterrupted service in the province’s nursing homes supercedes the right of the employees working in these homes to strike and the right of the owners of these homes to lockout in pursuit of their respective collective bargaining objectives. The final method of dispute resolution in the nursing home industry is interest arbitration. An employer in this industry, therefore, does not have the power to unilaterally force agreement of terms and conditions that are in his best interest. Instead the employer must make an open and reasoned presentation to an arbitrator who has the ultimate authority in this regard. Where, in the public interest, the element of ultimate self-determination is removed from the collective bargaining process and where, at the same time, funding is largely from the public purse, a realistic assessment of the impact of these interest arbitration awards should be made in determining the level of funding required to operate. However, notwithstanding the suspension of the right to strike or lockout, there can be no dispute that the employees who work in these homes and have chosen to bargain collectively are entitled to the same protections under the *Labour Relations Act* as any other employees. We reiterate, therefore, that under the *Labour Relations Act* an employer cannot

replace his bargaining unit employees because they have or might exercise rights under the Act, as Kennedy Lodge has done in this case.

REMEDIAL ORDER

69. Having regard to all of the foregoing, we hereby declare that under the terms of the arrangement between Kennedy Lodge and Medox —

- (i) Kennedy Lodge will continue to be the employer of the aides working within the Home, whether or not supplied by Medox.
- (ii) Any attempt to utilize the persons supplied by Medox in this capacity in place of the aides presently employed by Kennedy Lodge will constitute a breach of the collective agreement between Kennedy Lodge and the applicant/complainant trade union, which continues in full force and effect, and consequently a breach of sections 50 and 64 of the Act.

Finally, we hereby declare that the arrangement between Kennedy Lodge and Medox is in breach of sections 64 and 66 of the Act.

DECISION OF BOARD MEMBER J. WILSON;

1. The union has come before the Board to seek relief for the loss of jobs caused by Kennedy Lodge trying to reduce its costs in order to remain in business and provide a reasonable profit to its shareholders. The union's complaint and application raise the fundamental labour relations problem of an employer reducing its costs by taking actions that will have a devastating impact on its employees in a bargaining unit represented by a union. In assessing whether the conduct in this case entitles the Board to provide a remedy to the union the Board has to resolve three issues:

- (i) Has the collective agreement been violated by Kennedy Lodge contracting with Medox to provide much of the services that it had previously done with its own bargaining unit employees?
- (ii) Does the relationship between Medox and Kennedy Lodge give rise to a declaration by the Board under section 1(4) of the Act that they are one employer?
- (iii) Does subcontracting to reduce the level of costs which exists primarily because employees have engaged in collective bargaining violate the *Labour Relations Act*?

2. Section 50 of the Act, which is relied upon by the union, provides in part:

A collective agreement is . . . binding upon the employer and upon the trade union that is a party to the agreement . . . and upon the employees in the bargaining unit defined in the agreement.

The *entire* collective agreement is binding on the parties. While the collective agreement between Kennedy Lodge and the union contains many provisions that protect employees, the

agreement does not purport to insulate the employees from the consequences of management initiatives that are carried out in response to financial difficulties. Sections 2.03 and 6.01(d) of the collective agreement state:

Article 2.03, *No Contracting Out*

Where the employer finds it necessary to contract out work performed by the bargaining unit, and where such contracting out results in a layoff of employees, the employer undertakes to meet with the union no less than thirty days in advance of such layoff to consider what might be done to minimize the adverse affects upon the employees concerned.

Article 6, *Management Rights*

6.01 The union acknowledges that all management rights and prerogatives are vested exclusively with the employer and without limiting the generality of the foregoing it is the exclusive function of the employer:

• • •

- (d) to have the right to plan, direct and control the work of the employees and the operations of the Nursing Centre. This includes the right to introduce new and improved methods, facilities, equipment and to control the amount of supervision necessary, combining or splitting up of departments, work schedules and *the increase or reduction personnel in any particular area or on the whole.*

[emphasis added]

The rights of the union and the obligation of the employer with respect to the subcontracting of work are spelled out in the agreement. The agreement requires the employer to meet with the union at least 30 days prior to a layoff caused by the subcontracting of bargaining unit work. It does not prohibit Kennedy Lodge from subcontracting; indeed, sections 2:03 and 6:01(d), when read together, clearly contemplate that Kennedy Lodge might eliminate bargaining unit jobs by subcontracting a large portion or all of the work performed by bargaining unit employees. This Board had previously come to this same conclusion in a case between the same parties. In *Kennedy Lodge Nursing Home*, [1981] OLRB Rep. Oct. 1454 the Board wrote:

This article (6) together with article 2, headed "Scope and Recognition" are the major clauses embodying the trade-offs arrived at between management rights, union rights and employee rights . . .

The Board went on to conclude in paragraph 26:

In our view, article 6 is sufficiently broad to give the respondent the right to contract out work and there is *no express language placing any limits on such right*. That being so, the complainant cannot now be heard to say that such contracting out strikes at or delimits rights of the union's recognition.

[emphasis added]

3. In my view that result is not a startling one. There are many industries where the services required by an employer can be provided by subcontractors in accordance with the employer's specifications on a lump sum firm price basis or on a unit price basis. The construction industry is probably the prime example where a general contractor can subcontract all the work to speciality contractors and supervise an entire project with one on-site superintendent. Municipalities will often have subcontractors provide services, which may only be a matter of labour and supervision that could be performed by their own employees.

4. Where a union is fearful of job loss through subcontracting, it should protect itself by attempting to negotiate subcontracting provisions into a collective agreement. In this case the union obtained the right to discuss the adverse impact of subcontracting with the employer. The right to discuss the impact of subcontracting implies the existence of the right to subcontract. Kennedy Lodge went even further than required by raising the issue of the cost of sick leave payments and the need to reduce that cost some seven months before the decision was made to subcontract work. No resolution of the sick leave pay issue was forthcoming over that period. In his testimony about what transpired over those months, Mr. Laliberte was most evasive and, in my view, his evidence was not credible. In the light of the union's reluctance to address itself to this particular issue and its failure to appreciate that Kennedy Lodge was in financial difficulties, it is not surprising that Kennedy Lodge's decision to subcontract was made, as envisioned by the collective agreement.

5. I agree with the majority that the collective agreement contemplates a "*bona fide*" subcontracting of work, not the mere replacement of bargaining unit employees by other employees willing to work for less than what the agreement provides. However, I believe that such a *bona fide* subcontracting has taken place. Medox will exercise the day-to-day supervision of its employees to ensure that they perform to the standards prescribed by Kennedy Lodge which, to a very great degree, are set by the Government under the *Nursing Home Act* and Regulations. It seems to me that all Kennedy Lodge is concerned with in its subcontracting is that the standards and conditions it prescribes and enforces through its employees are met by the employees of Medox. Kennedy Lodge is not concerned with the identity of the employees performing the work, their experience, hours or vacation schedules. It is Medox which hires, trains, monitors, and pays them. Their hourly rate is set by Medox which is also responsible for the costs associated with employing employees, i.e. income tax, U.I.C. and C.P.P. remittances, Workers' Compensation Board premiums, and the maintenance of the payroll and work records required under the *Employment Standards Act* and *Nursing Home Act*. The ultimate disciplinary authority rests with Medox and not with Kennedy Lodge. In my opinion, Kennedy Lodge does not become the employer of the employees of Medox merely because it sets certain standards of performance which must be met. Certainly it is open to a contractor to stipulate the type and quality of service it expects from a subcontractor without becoming the employer of the employees hired by the subcontractor to do the work required. Therefore, I believe that Medox, on the facts as found by the majority, is the employer of the employees in question, and that the subcontracting arrangement is permitted by the collective agreement between Kennedy Lodge and the union.

6. The union also asks the Board to invoke section 1(4) of the Act to declare Kennedy Lodge and Medox one employer. It is conceded that they are separate corporate entities operating at arm's length. While the activities which they carry out are related, I do not think that those activities are carried out under common control or direction. The primary purpose

of section 1(4) is to preserve for bargaining unit employees and their unions their bargaining and collective agreement rights in the face of corporate and business transactions which change the legal, but not the actual identity of the employer. Finding two employers related is relatively easy when the two employers are not at arm's length in their relationship. However, in the case of two pre-existing, entirely separate businesses, the Board is, quite properly, more reluctant to find that the two employers are related for purposes of the *Labour Relations Act*. In the *Charming Hostess* and *Complete Car Care Centre* cases a section 1(4) declaration was refused, but was granted in *J. H. Normick*. In my view, those decisions, which deal with section 1(4) proceedings arising out of a subcontracting relationship, can stand together because they rest on the degree of control over the *labour relations* of the subcontractor. The mere fact that a contractor stipulates the level and quality of service to be provided and exercises "control" over the subcontractor to the extent that the subcontract may be cancelled if the stipulated levels of service are not maintained is not, in my opinion, the kind of direction or control contemplated by section 1(4). That section is only concerned with common control or direction over employers' labour relations, and not necessarily with control and direction of the methods used by a subcontractor to perform the services required under a subcontract. In my opinion, the control that Kennedy Lodge exercises over Medox relates to the quality and level of service provided. It has no control over the labour relations of the Medox employees. For that reason, I do not believe that a section 1(4) declaration is warranted.

7. Turning finally to the unfair labour practice aspect of this matter, since I find no violation of the collective agreement, I would dismiss the complaint as it relates to section 50. I agree with the majority's analysis of sections 64 and 66 as they relate to subcontracting to the extent that an employer that merely substitutes its own unionized employees with non-union employees in order to avoid its collective bargaining obligations is in violation of the Act. However, the *Labour Relations Act* does *not* guarantee that unionized employees will continue to hold jobs with their employer as long as their employer remains in business. An employer is entitled to try and remain competitive and receive a fair return on investment. Where the costs associated with the exercise of collective bargaining rights cause an employer to become uncompetitive or to operate at a loss, that employer must look at ways to reduce costs within the framework of the *Labour Relations Act*. *Bona fide* subcontracting to reduce costs does not give rise to an anti-union inference. Employees and their unions must be as sensitive to these harsh economic realities as employers are. Demands may be made of an employer, which, if accepted, may eventually render the employer uncompetitive, or the business unprofitable. In those circumstances, an employer's response in order to remain in business and provide jobs must be the reducing of costs. It may be unfortunate if cost reduction adversely affects employees, but so long as the impact on the employees is the *consequence*, and not the *purpose* of the employer's action, no violation of the Act exists. In my view, there must be direct evidence of employer anti-union motive, and not simply evidence that the wages of the subcontractors' employees are lower than what was paid previously by the employer to sustain a finding that subcontracting violates the *Labour Relations Act*.

8. It has been observed in the majority decision that Kennedy Lodge faces a serious financial crisis. It is not alone. Many other nursing homes, some presently before the Board, are in the same predicament. Some of them may go bankrupt. Some will keep their heads above water because they have other sources of income, e.g. a retirement home as an adjunct to the nursing home. This problem is not new but it has been exacerbated in the past few years. The reasons are twofold:

- 1) The funding of the nursing homes by the Ministry of Health has been

held within guidelines set by the Province that have imposed severe financial problems on the industry.

- 2) As a result of interest arbitrations under the *Hospital Labour Disputes Arbitration Act*, wages and benefits for the employees have risen at a rate that bears no resemblance to rates allowed by the Ministry. As a result, the squeeze has come on the nursing homes and consequently they have looked at cost -conserving measures.

9. It must be appreciated also that an enterprise like a nursing home is quite labour-intensive. It is apparent that nursing home patients in general need little care at the start but that as time passes and they move into a requirement for greater care, then "intermediate care" gives way to "extended care" which is much more costly. This is evidenced by some nursing homes requiring R.N.A.'s rather than N.A.'s in the "heavy care" areas. A greater problem arises when the "extended care" patient requires care which really falls into the category of "chronic care".

10. It would seem that answers are necessary if the nursing home industry is not to wind up in complete chaos. And as an aside, municipal control of such services as against the private nursing home does not seem to be a viable answer; they are in trouble too as witness the recent arbitration at Thompson House in Don Mills. The union members having achieved great gains over the last six years must be prepared to curb their ambitions or risk losing their places of employment. The nursing homes' administrators need to curb expenditures and live within their budgets. That may be difficult in view of their basic dedication to the welfare of the residents but it must be attempted. In future negotiations between union and management there must be a realistic attempt to arrive at workable agreements. The use of interest arbitration to achieve certain desired results is a poor substitute for collective agreements reached through negotiations.

11. The normal constraints on negotiations conducted under the *Labour Relations Act* are not as effective in this industry because the parties are subject to the *Hospital Labour Disputes Arbitration Act*. If the parties cannot come to an agreement, then resort is had to arbitration, not strike or lockout. Furthermore, these employers' revenues are strictly controlled by the Ministry of Health. They are faced with both revenues and wage costs that are beyond their control. In order to continue in business, a reduction in costs had to be effected. It seems to me that the decision was made by Kennedy Lodge in this case to subcontract for proper business reasons and not to deprive employees of their legal rights under our labour legislation. While it is indeed unfortunate that job losses to these employees will result, the remedy does not lie with this Board, but rather with the Ministry of Health to ensure adequate funding is maintained, and with the employees and their union to either seek protection from layoff under the collective agreement or agree to wage levels that will reflect the level of revenues received by the employer.

0018-84-M The Kitchener-Waterloo Catholic High School Board of Governors, Employer, v. London & District Service Workers Union, Local 220, Trade Union

Arbitration — Reference — Employer making timely request for expedited arbitration — Request not pre-empted by prior untimely initiation of arbitration under collective agreement by union — *Royal York Hotel* court decision distinguished

BEFORE: R. O. MacDowell, Acting Alternate Chairman, and Board Members S. Cooke and J. A. Ronson.

APPEARANCES: *M. Patrick Moran and Seb Englert for the employer; Randy Levinson for the union.*

DECISION OF R. O. MACDOWELL, ACTING ALTERNATE CHAIRMAN, AND BOARD MEMBER S. COOKE; July 18, 1984

1. This is a reference under section 107(1) of the *Labour Relations Act*. The Minister of Labour has referred to the Board a question that relates to his authority to appoint an arbitrator under section 45 of the Act. The material provisions of section 45 read as follows:

45.-(1) Notwithstanding the arbitration provision in a collective agreement or deemed to be included in a collective agreement under section 44, a party to a collective agreement may request the Minister to refer to a single arbitrator, to be appointed by the Minister, any difference between the parties to the collective agreement arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.

(2) Subject to subsection (3), a request under subsection (1) may be made by a party to the collective agreement in writing after the grievance procedure under the agreement has been exhausted or after thirty days have elapsed from the time at which the grievance was first brought to the attention of the other party, whichever first occurs, but no such request shall be made beyond the time, if any, stipulated in or permitted under the agreement for referring the grievance to arbitration.

(3) Notwithstanding subsection (2), where a difference between the parties to a collective agreement is a difference respecting discharge from or other termination of employment, a request under subsection (1) may be made by a party to the collective agreement in writing after the grievance procedure under the agreement has been exhausted or after fourteen days have elapsed from the time at which the grievance was first brought to the attention of the other party, whichever first occurs, but no such request shall be made beyond the time, if any, stipulated in or permitted under the agreement for referring the grievance to arbitration.

(4) Where a request is received under subsection (1), the Minister shall appoint a single arbitrator who shall have exclusive jurisdiction to hear and

determine the matter referred to him, including any question as to whether a matter is arbitrable and any question as to whether the request was timely.

2. Section 45 is a relatively new addition to the Act. It was introduced in 1979 in the wake of widespread concern about the existing grievance-arbitration process, and the efficacy of the tripartite arbitration board model envisaged by section 44(2) of the Act. In July 1978, the Honourable Arthur Kelly, sitting as an industrial enquiry commissioner, tabled a report which was sharply critical of the cost and delays, seemingly inherent in the existing arbitration system. The legislative response was section 45 of the Act. It has three main purposes: to expedite the hearing of unresolved grievances, to provide third party assistance to aid in the settlement of such grievances (see section 45(6)), and to reduce the cost of arbitrating employer-employee disputes by substituting the statutory alternative of a single arbitrator, even though the parties' collective agreement might contemplate a tripartite board.

3. The amendments were simple but significant in their impact. They enable *either* party to apply to the Minister for the appointment of a single arbitrator thirty days after the grievance is filed or following the completion of the grievance procedure, whichever occurs first. On the receipt of such request, the Minister must appoint an arbitrator who is able to begin hearing the dispute within twenty-one days. Grievances involving the discharge of employees are dealt with even more quickly. And the statute makes the section 45 mechanism available notwithstanding the grievance-arbitration procedure provided in the parties' agreement. Section 45 is obviously remedial legislation which should be given a liberal construction.

4. Access to the new expedited arbitration process is governed by section 45(2), which defines and circumscribes the right to resort to the statutory alternative. Section 45(2) creates what might be described metaphorically as a "time window", which "opens" with the completion of the grievance procedure or the passage of thirty days, whichever occurs first, but "closes" again, upon the expiry of the time period (if any) stipulated in the agreement for referring a matter to arbitration. A reference to arbitration under section 45 can only be made within these time limits. A party wishing to use the section 45 option, must make its request while the "time window" is open. Upon receipt of a timely request, the Minister must appoint an arbitrator who under section 45(4) then has *exclusive* jurisdiction to hear and determine the matter.

5. The facts in the instant case are not really in dispute; but, in order to put them in context, it is necessary to first set out certain provisions of the parties' collective agreement:

ARTICLE 6 — COMPLAINT PROCEDURE

- 6:01 It is the mutual desire of the parties hereto that complaints of the Employer or of the employees will be adjusted as quickly as possible.
- 6:02 If an employee has a legitimate complaint, he shall refer the matter to his immediate Supervisor, within six (6) months of the day following the date of the incident which gave rise to the complaint.
- 6:03 If such complaint is not settled between the employee and his immediate Supervisor, it shall be reduced to writing and submitted to the Superintendent of Business and Finance within two (2) working dates of the Supervisor's reply.

- 6:04 The decision of the Superintendent of Business and Finance shall be communicated to the employee in writing within five (5) working days of the receipt of the written complaint from the employee.

ARTICLE 7 — GRIEVANCE PROCEDURE

- 7:01 If such complaint is not settled under the Complaint Procedure as provided, it shall be treated as a grievance and shall be discussed at a special meeting of the Board (or such sub-committee as the Board may from time to time designate for the purpose) and the Union Committee. It is agreed that a grievance may arise only from a dispute concerning the interpretation, application, administration, or alleged violations of this Agreement.
- 7:02 Such special meeting shall be held within fifteen (15) working days of receipt by the "Chairman of the Kitchener-Waterloo Catholic High School Board of Governors" of a written request from the Union Committee or within such further time as may be mutually agreed upon.
- 7:03 No matter other than the grievance in question shall be discussed except by mutual consent of the parties.
- 7:04 It is agreed that the Union Representative of Local 220, may be present with the Union Committee at the request of either the Union or the Board.
- 7:05 Whenever any grievance cannot be settled within fifteen (15) working days after it has been discussed at such special meeting between the Committees, it may be referred to arbitration.
- 7:06 Where differences arise between the parties concerning the interpretation or violation of this agreement which may be considered as policy matters, the differences between the parties shall be reduced to writing by the Union Committee and submitted to the Board.
- 7:07 If the matter of the policy grievance is not satisfactorily settled by the Board, it is understood that it may be carried through the balance of the Grievance Procedure.
- 7:08 It is agreed and understood that if the Employer has a grievance concerning the general conduct of the employees or of the Union, it may by letter addressed to the Union Committee or its Chairperson, request that a special meeting be held and the procedure as provided for in Article 7, Grievance Procedure would follow.
- 7:09 If an employee claims that he has been unjustly discharged he may, within five (5) working days of receiving written notification of discharge, a copy of such notification having been sent to the Chairperson of the Union Committee, have a written grievance submitted

to the Chairman, Maintenance Committee by a member of the Union Committee. The Chairman, Maintenance Committee will call a special meeting as outlined in Clause 7:02 to discuss the grievance.

If the grievance is not satisfactorily settled, it will be carried forward to conclusion as outlined in subsequent clauses in the Grievance Procedure article.

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ARTICLE 8 — ARBITRATION PROCEDURE

- 8:01 When either party requests that a grievance be submitted to arbitration the request shall be in writing addressed to the other party of the grievance and shall at the same time name one person as its appointee to the Arbitration Board.
- 8:02 The recipient of the notice shall, within fifteen (15) days of the receipt of same, name one person as its appointee to the Arbitration Board. If the recipient fails to name a nominee within the fifteen (15) days, the party requesting Arbitration shall apply to the Minister of Labour for the Province of Ontario, for the appointment of a nominee.
- 8:03 The two (2) appointees shall, within five (5) days of the appointment of the latter, meet or contact each other in an endeavour to agree upon a third person to act as Chairman. If the two (2) appointees fail to agree upon a Chairman within the said five (5) days, they shall request the Minister of Labour for the Province of Ontario to appoint a Chairman forthwith.

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- 8:05 No matter may be submitted to arbitration which has not been properly carried through all previous steps of the grievance procedure.

It will be seen that under Article 7:05, grievances may be referred to arbitration if they cannot be settled within fifteen working days after discussion at the special meeting between the parties specified in Article 7:02. The date of the special meeting supplies the bench mark from which time runs. It will also be noted that the parties have provided that no matter may proceed to arbitration unless it has properly been carried through all of the previous steps of the grievance procedure. The obvious intention is that the dispute be fully aired prior to the resort to a more formal litigation process.

6. The dispute between the parties concerns the failure by the employer to employ one Mr. D. Weare in the position of "custodian". There were preliminary discussions between the parties about this problem on November 15 and November 29, 1983. Formal grievances were filed on December 29, 1983, claiming that Mr. Weare should have been given this job. On

January 6, 1984, the employer gave its reply, denying the validity of Mr. Weare's individual grievance and requesting further particulars of the union's policy grievance arising from the same issue. On January 12, 1984, the union wrote to the employer advising that it did not consider the employer's response satisfactory, and that the union was referring the grievance to a tripartite board of arbitration established in accordance with Article 8 of the collective agreement. The union's letter of January 12th included the name of its nominee to such board of arbitration. On January 19, 1984, the employer objected to the submission of these grievances to arbitration, on the ground that such reference was premature. The grievances had not been carried through all previous steps of the grievance procedure, as contemplated by Article 8:05, nor had there been any request for a special meeting to deal with the grievances as envisaged by Article 7:02. The employer's position is that the language of Article 8:05 is clear: a dispute cannot proceed to arbitration under the agreement unless it has been properly processed through the previous steps of the grievance procedure. On February 16, 1984, the employer made a request for the appointment of an arbitrator under section 45 of the Act, which was stated to be "without prejudice" to its position that the union's request for a board of arbitration under the agreement was premature, because the required steps in the grievance procedure had not yet been completed.

7. The union's position is that when it embarked upon the arbitration route under the agreement, it foreclosed any resort to arbitration under section 45. Having initiated the "private mechanism", the statutory alternative is no longer available. The union relies on the following passage from the decision of the Divisional Court in *Re Hotel, Restaurant and Cafeteria Employees Union, Local 75, and Royal York Hotel* (1983), 42 O.R. (2d) 509:

It is the applicant's contention that the learned arbitrator was in error in his interpretation of the statute. It is submitted that art. 18 sets out the time-limit for submitting a grievance to arbitration and that time-limit had passed when the s. 45(1) request was made. It was further submitted that the arbitrator had extended the statutory time-limit into a period when the arbitration process had been initiated and was pending. It is the contention of the respondent that in order to give efficacy to the provisions of s. 45 (which both parties agree, was enacted for the purpose of providing an expeditious arbitration process), the time limitation for making the referral should receive a liberal construction and that a reference to arbitration should be interpreted to mean a reference to the body which will be dealing with the dispute. As that body had not been constituted when the s. 45 request was made there had not been in the submission of the respondent any referral to arbitration.

In my opinion, the Legislature intended to provide strict time-limits within which a party might make the request provided for in s. 45. In contrast to s. 44(6) of the Act which provides for extensions of time in grievance procedures there is no provision for the extension of the time-limits set out in s. 45(2). We have before us two possible interpretations of that time-limit. In my opinion, a submission to arbitration under either art. 18.6 or art. 18.19 of the collective agreement is a referral to arbitration within the meaning of s. 45(2) of the Act. It seems to me that the plain meaning of the word "referring" in the context of the legislation must be restricted to the initiation of the process by either party. The applicant invoked the arbitration process which in its normal course would continue with the appointment

of a board of arbitration, the hearing and the eventual decision. *Once the process was invoked by either party, it would appear to be the scheme of the legislation that each would have to abide by it until either settlement or decision.* While an extension of time under art. 18 might have extended the time in s. 45(2), the extension under art. 19(2) was not part of the referral to arbitration, but was rather an extension of one of the steps in the arbitration process.

In my view the learned arbitrator was right in stating that s. 45 could not be invoked after the parties had lost the right "to go to arbitration" but he misapprehended the situation when he found that on July 2, 1982, the parties were contemplating going to arbitration. It would appear that he interpreted the section in the manner submitted by the respondent. In my view, the interpretation submitted by the applicant is more reasonable both on the meaning of the words and in the context of the legislation.

• • •

This is new legislation. It is important that other arbitrators appointed under s. 45 be certain of the limits which give them jurisdiction. It may be, as contended by the respondent, that this is not an efficacious result in terms of practical labour relations. If this is so, then statutory amendment would appear to be the only solution.

[emphasis added]

The union argues that if the arbitration process contemplated by the collective agreement is initiated *prior* to the reference under section 45, it is the "private" process which takes precedence — even though a section 45 application might otherwise or subsequently be timely. To put the matter colloquially: the party "first off the mark" in triggering the arbitration process, governs the institutional framework within which the grievance will be resolved. The first party to refer the matter to arbitration controls whether it will be dealt with by a single arbitrator appointed by the Minister under section 45, or a tripartite board appointed under the terms of the collective agreement. The union relies upon the emphasized words in the above-noted passage from the *Royal York* decision.

8. The employer takes the position that the Divisional Court decision has no application to the circumstances of this case, and notes, parenthetically, that if the union were right, in a case such as this, the remedial thrust of section 45 could be substantially blunted. A party could merely opt for the arbitration board structure prescribed in the agreement early in the grievance procedure, well before any reference under section 45 might arise or be timely in accordance with section 45(2). That is what the union has purportedly done here. In the employer's submission, if this gambit is successful, it would defeat the purpose of section 45 — which was to provide an expedited, inexpensive alternative to the arbitration procedure in the parties' collective agreement.

9. In the alternative, the employer argues that even if the union's interpretation of *Royal York Hotel* is the correct one, that case has no application here. The parties had not reached the stage where one or the other was entitled to make a reference to arbitration under the agreement. The agreement contemplates the holding of a special meeting and no such meeting

was ever requested by the union. The purported referral to arbitration was untimely. The employer relies upon the decision of a board of arbitration in *Re Consolidated-Bathurst Packaging Ltd. and International Woodworkers, Local 2-337* (1977), 15 L.A.C. (2d) 365 (Brunner) wherein the board of arbitration was unanimously of the opinion that language like that of Article 8:05 meant it was necessary to complete the steps in the grievance procedure before moving on to arbitration. The employer urges this Board to adopt that rationale in the instant case: the union must complete the grievance procedure before any question can arise as to the appropriate steps to be taken to bring the case to arbitration. The union's purported referral to arbitration is simply premature. It is of no effect at all, and cannot foreclose a timely reference under section 45.

10. The opinion of the Divisional Court obviously requires consideration; but, in our view, it must be read carefully, in light of the arguments made in that case, and the precise issue before the Court for its determination. Again, it may be helpful to review the facts and the terms of the collective agreement there in issue. The agreement language is set out in the Court decision itself, and reads as follows:

18.6 Failing settlement of the grievance at Step 3, the Union may submit the grievance to arbitration, within ten (10) working days from the date of the General Manager's reply at Step 3, as described in Article 19.

• • •

18.9 The other party shall give its written response within ten (10) working days from the receipt of the grievance. Failing settlement of the grievance the party filing the grievance may submit it to arbitration within ten (10) working days from the date of the reply to the grievance.

19.1 Written notification of an intent to arbitrate a grievance, by one party to this Agreement to the other party, shall contain that party's nominee to the board of arbitration. Within ten (10) working days thereafter, the other party shall nominate its member to the board of arbitration in response to the Union so doing.

11. In *Royal York*, the union filed a grievance concerning the reduction in working hours of certain employees. By March 22, 1982, the grievance had made its way to step 3 of the grievance procedure. The next step was arbitration. The terms of the collective agreement provided (in Article 18.6) that *the union may* submit a grievance to arbitration within ten working days, or, alternatively (under Article 18.9), that the party filing the grievance (again the union) may submit it to arbitration within ten working days. In either case, there was a ten-day time limit within which the union could proceed.

12. The union did refer the grievance to arbitration on April 21st, by appointing its nominee to a board of arbitration as required by Article 19 of the collective agreement. This appointment set in motion the tripartite arbitration mechanism. No objection was taken by the Hotel to the union's failure to observe the ten-day time limit. While the parties were pursuing settlement discussions, the union agreed to an extension of the time prescribed under Article 19 for the appointment of the Hotel's nominee to the arbitration board. At this stage, both parties appeared to be content with the arbitration board mechanism prescribed in their collective agreement. On July 2nd, however, the Hotel purported to make a referral under

section 45. The union objected that the time for doing so — that is, the ten-day period prescribed in Article 18 — had long since past, and had not been waived or extended by agreement. The Court sustained the union's objection and found that by July 2nd, the Hotel did not have the right to invoke section 45. The "time window" had closed by then.

13. The Divisional Court's oral decision is fairly brief, and does not disclose the full argument of the parties to which the Court was responding. However, in our view, the Court was dealing only with a time limit question: whether or not the section 45(2) "time window" should be strictly construed, and whether a referral by the Hotel beyond that time limit would be a valid one. In the passage cited above, the term time limit is mentioned numerous times. The Court opted for strict construction of the time window and found that the Hotel's reference was untimely. The Court rejected the arbitrator's opinion that the extension of the time accorded to the Hotel for appointing its nominee extended the time for making a section 45 reference. However, we do not think the Court was propounding a rule of institutional pre-emption: that the early initiation of the contractual arbitration process could foreclose a timely resort to the statutory alternative. In our view, that was simply not the issue before the Court, nor can this important conclusion reasonably be gleaned from the statement (itself tentative) upon which the union relies here.

14. We are reinforced in our view by a consideration of the underlying structure and purpose of section 45, which, as we have already noted, was intended to provide a cheaper and faster statutory alternative to the more cumbersome tripartite arbitration board contemplated by section 44(2) of the Act and embodied in many collective agreements. From a policy point of view, it is difficult to accept that the Legislature envisaged a "foot race" wherein the party who makes the first reference to arbitration can control the form of the arbitration mechanism — particularly if it involves a pre-emption of the designated statutory alternative. We can discern no policy reason why a timely resort to the expedited arbitration process in the statute should be short circuited by an action taken under the agreement. Indeed, the opening words of section 45 ("notwithstanding the arbitration provision in the collective agreement"), together with the exclusive jurisdiction accorded to the section 45 arbitrator, suggests precisely the opposite conclusion. The plain words of the statute suggest that a timely section 45 reference is available *regardless* of the arbitration procedure in the parties' collective agreement (with the possible proviso that if both parties have opted for the private route and have incurred the attendant expense, neither will be permitted to resile from the chosen path — see *Spiers Bros. Ltd.*, [1978] OLRB Rep. Sept. 871). That is why the Legislature considered it necessary to spell out that the section 45 arbitrator would have *exclusive* jurisdiction to hear the grievance. The interpretation urged upon us by the union in this case could substantially undermine the efficacy of section 45 as a speedy and less expensive arbitration alternative, and requires that we ignore plain meaning of the statutory language. We would be reluctant to embrace an interpretation which flies so clearly in the face of the legislative intent.

15. It was unnecessary for the Court to consider these matters in *Royal York* and, in our view, it did not do so. It was dealing with a more narrow question of timeliness which was all that was necessary to resolve the case before it. In our opinion, the *Royal York* decision simply does not stand for the proposition urged upon us by the union in this case.

16. Even if the union's characterization of *Royal York* were correct (and for the foregoing reasons we do not think that it is), it could have no application in the circumstances of the instant case. It simply could not have been intended that an *untimely* referral to arbitration — a referral made contrary to the express terms of the collective agreement — could foreclose

a timely reference under section 45. To accept that submission would extend the notion of a "foot race" to absurd lengths. One party or the other could simply invoke the "private" process (albeit prematurely) before the "time window" opened, thereby cutting off the section 45 option altogether. That result would be inconsistent with the intent of section 45 and merely reinforces our view that it was intended to be available *notwithstanding* the arbitration procedures contained in the parties' collective agreement. Accordingly, assuming, without finding, that the union is correct in its interpretation of the effect of *Royal York*, we do not think the union's premature reference to arbitration in this case can cut off the employer's access to section 45 — provided, of course, that the employer's application is itself made within the time limits prescribed in section 45.

17. Is the employer's section 45 referral timely in the instant case? In our view it is. By February 16, 1984 more than 30 days had passed since the filing of the grievance. The "time window" had opened. The agreement does not contain a limitation beyond which a grievance cannot proceed to arbitration and, in any event, as we have already noted, the grievance here never did make its way through the steps specified in the agreement prior to the arbitration stage. The "time window" had not closed. The employer's referral was timely and effective notwithstanding the arbitration procedure in the parties' collective agreement and the union's earlier but untimely attempt to initiate the arbitration process set out in the agreement.

18. For these reasons, the Board is of the view that a timely application by the employer under section 45 has been made, and that the Minister has jurisdiction to appoint an arbitrator under section 45 of the Act.

DECISION OF BOARD MEMBER JAMES A. RONSON;

1. I agree with my colleagues that a timely application under section 45 of the Act has been made by the employer. I do so on the basis that the union's previous application was untimely under the terms of the collective agreement.

2. I cannot agree with my colleagues when they seek to distinguish the reasoning of the Divisonal Court in *Re Hotel, Restaurant and Cafeteria Employees, Union, Local 75, and Royal York Hotel* (1983), 43 O.R. (2nd) 509. It seems to me that the Court has spoken to a point of law in that case which binds this Board, and no matter how unhappy we may be with the results that follow, we are bound to apply it. The effect is that once the arbitration procedures under the collective agreement are validly initiated, then section 45 of the Act cannot be used by either party.

0836-84-R Energy and Chemical Workers Union, Applicant, v. **Maple Leaf Mills Limited**, Master Feeds Division, Respondent, v. Teamsters, Local Union 879, Intervener

Membership Evidence — Practice and Procedure — Receipt portion of membership evidence filed in support of prehearing application not counter-signed by collector — Collector's name not shown on cards — Defect cannot be cured by fresh evidence obtained and filed after application date — Board directing vote but ordering ballot boxes sealed — Permitting *viva voce* evidence to cure defects after vote taken.

BEFORE: Owen V. Gray, Vice-Chairman, and Board Members I. M. Stamp and C. A. Ballentine.

DECISION OF THE BOARD; July 16, 1984

1. This is an application for certification, in which the applicant has requested that a pre-hearing representation vote be taken. The application was filed by registered mail on June 22, 1984. It was accompanied by what purported to be documentary evidence of membership of 28 persons claimed to be employees of the respondent. The membership evidence was accompanied by a Form 9 Declaration of David F. Pretty, a National Representative of the applicant. Paragraph three of that document reads as follows:

3. (Where the documentary evidence consists in part of receipts or other acknowledgments of the payment on account of dues or initiation fees.) On the basis of my personal knowledge and inquiries that I have made, I state that *the persons whose names appear on the receipts or other acknowledgments of the payment on account of dues or initiation fees are the persons who actually collected the moneys paid on account of dues or initiation fees* and that each member, on whose behalf a receipt or an acknowledgment of payment is submitted has personally paid in money the amount shown thereon on his own behalf to the person whose name appears on his receipt or acknowledgment of payment as collector, EXCEPT IN THE FOLLOWING INSTANCES:

(emphasis added)

No exceptions are noted on the form. The membership evidence consisted of combination applications for membership and receipts which were, on their face, regular in all respects but one: none of the receipts have been countersigned by the collector of the card, and the name of the collector of the \$5.00 payment referred to therein is nowhere shown on any of the cards.

2. By letter dated June 29, 1984, Mr. Pretty wrote to the Registrar of this Board, saying:

Inadvertently, 28 of the previously filed membership cards, had not been countersigned by the witness as having received the initiation fee payment. Proper receipts were however provided to the applicants and the monies were paid and are being held by myself.

Resultantly we have repeated the process and enclose herewith 22 properly

countersigned applications for membership to supplement or substitute for the earlier filing.

In addition to the 22 combination application-receipts referred to in that letter, eight additional combination application-receipts were later obtained and forwarded to the Board. Obviously, all of these membership applications were signed after the application date.

3. The parties met with a Labour Relations Officer on July 6, 1984, and agreed that the unit of employees appropriate for collective bargaining in this case should be described as follows:

All employees of the company working in the Feed and Pet Food Plant at Guelph, Ontario, save and except foremen, those above the rank of foreman, office and sales staff.

The Board determines that that unit shall constitute the voting constituency for the purpose of any vote in this application.

4. The threshold issue, however, is the adequacy of the membership evidence filed in connection with this application. Section 9(2) of the Act requires us to determine whether:

. . .it appears. . .on an examination of the records of the trade union and the records of the employer that not less than 35 per cent of the employees in the voting constituency were members of the trade union *at the time the application was made*. . .

[emphasis added]

The only evidence of membership in the applicant "at the time the application was made" is the membership evidence submitted with the application. Applications for membership signed after the application date can be of no assistance to the applicant in meeting the test set out in section 9(2). The question we must consider is whether the "records" submitted with the application are sufficient to meet that test. We must also consider the provisions of section 9(4) of the Act, which provides that the Board must be satisfied, after a pre-hearing representation vote has been taken, that not less than 35 per cent of the employees in the appropriate bargaining unit were members of the trade union at the time the application was made. If the Board is so satisfied, the pre-hearing representation vote may then have the same effect as a representation vote taken under section 7(2) of the Act. By necessary implication, if the membership evidence submitted with the application, together with any evidence which might be admitted at the post-vote hearing, is not sufficient to satisfy the Board that the applicant had the requisite level of support among employees in the bargaining unit as of the date of application, then the pre-hearing vote can have no effect, no matter how many votes are cast in the applicant's favour. Even if the applicant's membership evidence is sufficient to create an "appearance" of support which satisfies the test under section 9(2), there would be no point in exercising our discretion to direct a representation vote if the absence of countersignatures on the receipt portions of the membership evidence is a defect which could not be cured.

5. The Board has considered a number of previous Board decisions, including: *Williams Machines Limited*, [1972] OLRB Rep. Oct. 879, *Leon's Furniture Limited*, [1977] OLRB Rep. Jan. 25, *Emanuel Products Limited*, [1977] OLRB Rep. Feb. 37, *Diplock Durable Floor*

Co. Ltd., [1978] OLRB Rep. July 613. It appears from these authorities that while there is grave doubt that the Board could be "satisfied" under section 9(4) on the basis alone of the material filed with the application, it is at least open to argument that the defects in the evidence can be cured by appropriate *viva voce* evidence. This would necessarily include evidence of the Form 9 Declarant, who would be obliged to explain how he could sign a declaration that "the persons whose names appear on the receipts. . . are the persons who actually collected the moneys paid. . ." when there are no names of collectors on the documentary evidence filed. We conclude that the evidence submitted with the application is qualitatively sufficient to support the appearance required by section 9(2), and that it is a matter for further argument whether the evidence is qualitatively sufficient to satisfy the Board under section 9(4) of the Act.

6. Accordingly, and having examined the records of the applicant and the respondent, it appears to the Board that not less than 35 per cent of the employees of the respondent in the voting constituency hereinbefore described were members of the applicant at the time the application was made.

7. The Board therefore directs that a pre-hearing representation vote be taken of the employees of the respondent in the aforesaid voting constituency. All employees of the respondent in the voting constituency on July 4, 1984, who have not voluntarily terminated their employment or who have not been discharged for cause between July 4, 1984, and the date of the vote will be eligible to cast ballots.

8. Voters will be asked to indicate whether they wish to be represented by the applicant or the intervener in their employment relations with the respondent.

9. Having regard to the matters referred to earlier in this decision, and to ensure that none of the parties is prejudiced in this matter, the Board directs that the ballot box be sealed and the ballots not counted until further order of the Board.

10. The matter is referred to the Registrar.

0731-84-R Ontario Public Service Employees Union, Applicant, v. **The Board of Education for the City of North York**, Respondent, v. Ontario Secondary School Teachers' Federation, Intervener

Certification — Practice and Procedure — Representation Vote — Dispute as to number of occasional teachers to be counted as employees for purposes of pre-hearing application — Board setting out practice relating to pre-hearing votes — Refusing delay of vote until commencement of new school term

BEFORE: Owen V. Gray, Vice-Chairman, and Board Members B.L. Armstrong and I.M. Stamp.

DECISION OF THE BOARD; July 6, 1984

1. This is an application for certification in which the applicant union has requested that a pre-hearing vote be taken.

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3. Pursuant to section 10 of the Board's Rules of Procedure, the intervener has filed with the Board in timely fashion an intervener's application for certification (Form 13). The intervener has also requested that a pre-hearing vote be taken. Under the circumstances, the Board is satisfied that this is an appropriate case in which to exercise its discretion under section 103(3)(a) of the Act to treat the intervener's application for certification as having been made on June 13, 1984, which is the date on which the applicant made its application for certification.

4. The parties have met and agreed that the voting constituency and the unit of employees appropriate for collective bargaining in this case should be described as follows:

All occasional teachers employed by the respondent in its secondary school panel in the City of North York, save and except persons covered by subsisting collective agreements.

Clarity Note: For the purpose of clarity, the term "occasional teacher" means a teacher employed as a substitute for a permanent, probationary or temporary teacher who has died during the school year or who is absent from his regular duties for a temporary period that is less than a school year and that it does not extend beyond the end of a school year, and does not include any teacher who is employed under a contract of employment in the form prescribed by the regulations under the *Education Act*.

5. While the parties agree on the bargaining unit description, they disagree on the identity of the individuals who fell within its scope on the date the application was made. While they agree that occasional teachers at work on that date would be included, they disagree on the test to be applied to the occasional teachers not at work on that date to determine which of them, if any, would nevertheless be considered to be "employees" of the respondent as of that date. They raise a serious question whether the Board should adopt some test other than the "thirty-thirty" rule ordinarily applied by the Board to determine employment relationships for the purpose of a count outside of the construction industry. In addition to this disagreement

over the means of ascertaining who was an "employee" on the application date, the applicant and intervener each challenge the correctness of information supplied by the respondent with respect to the dates of its employment of certain persons as occasional teachers.

6. The respondent submits that any vote ordered by the Board should be deferred to a date after the commencement of the new school year in September, 1984. This submission is based on the fact that all classes and examinations for students attending the respondent's secondary schools ended June 21, 1984, and that it is the practice of the respondent not to call upon the services of occasional teachers until classes recommence in September of the new school year. In the circumstances, the respondent says that a low voter turn out might be anticipated and suggests that these and other grounds are sufficient to lead the Board to defer the vote. The applicant and intervener opposed a delay of the vote, which could be held on July 17th unless the Board otherwise directs. If a vote is held in July, the parties agree that notice of the vote should be given by mail to all those who may be eligible, and the respondent will provide the names and addresses that the Board requires in that regard.

7. The purpose of the pre-hearing vote procedure is to test the question of representation as quickly as possible after the application date. This avoids the prejudice which inevitably occurs when the conduct of a representation vote must await the determination of factual and legal issues which can only be resolved after a hearing in which each of the affected parties can participate. Often those disputed issues include the appropriate description of the bargaining unit, voter eligibility and employee status of challenged individuals. If the existence of such disputes could stand in the way of a pre-hearing vote, the procedure's efficacy would be destroyed. That is why the Legislature required only that the Board strike a voting constituency and prescribed as the vote prerequisite only that the applicant have the appearance of the requisite support within the voting constituency. (See generally *Emery Industries Limited*, [1980] OLRB Rep. March 316 at paragraphs 5, 6 and 7.) Where determination of the actual prerequisite level of support depends on a resolution of contested factual or legal issues, the Board assesses the appearance of support on the assumption that the union's position on the matters in dispute is correct. A pre-hearing vote is normally directed if, on that assumption, the requisite appearance of support is present. The contested issues are dealt with after the vote is held. However, the results of a pre-hearing vote are of no effect unless it is later demonstrated that not less than 35 per cent of the persons ultimately found to have been employees in the appropriate bargaining unit on the application date were members of the applicant on that date. If that demonstration depends on contested issues being later resolved in the applicant's favour, the Board will normally defer counting any ballots until it can resolve those issues which bear on the propriety of counting all, or any, of the ballots.

8. As access to the pre-hearing vote procedure is a function of the matters of fact and law put in issue by the parties, there is a risk that frivolous allegations and arguments may be made. The same risk exists whenever entitlement to launch and prosecute proceedings depends only on the assertion of a *prima facie* case. However, a trade union which gains access to the process by asserting unfounded and frivolous allegations and arguments only does itself harm. If it cannot ultimately demonstrate that it had the requisite support, it will never know how many ballots were cast in its favour, because unless the requisites of subsection 9(4) are met, there will be no reason to unseal the ballot box. The application having been pressed past the meeting with the officer, dismissal of the application will normally carry with it a bar imposed under section 103(2)(i). If it becomes apparent to the Board that the assertions which led to the vote were frivolous when made, then the Board may take that into account in determining the length of the bar.

9. Upon an examination of the records of the applicant and the respondent, assuming that the applicant's position on the matters in dispute is correct, it appears to the Board that not less than thirty-five per cent of the employees of the respondent in the voting constituency were members of the applicant at the time the application was made.

10. Upon an examination of the records of the intervener and the respondent, assuming that the intervener's position on the matters in dispute is correct, it appears to the Board that not less than thirty-five per cent of the employees of the respondent in the voting constituency were members of the intervener at the time the application was made.

11. The Board therefore directs that a pre-hearing representation vote be taken of the employees of the respondent in the voting constituency described in paragraph 4 of this decision.

12. The vote hereby directed will not be delayed until September, 1984. It is to be conducted as soon as administratively practicable, consistent with the arrangements discussed between the parties and the Labour Relations Officer assigned to this matter. The propriety of conducting a representation vote of occasional teachers during the summer months is a matter which can only be determined at a hearing at which all of the parties have the opportunity to lead evidence and make representations. Just as with disputes over bargaining unit descriptions and voter eligibility, any delay of the vote pending resolution of this issue would be inconsistent with the purpose of the pre-hearing vote procedure. Having regard to the existence of that issue, however, as well as the other matters in dispute, and in order to ensure that none of the parties is prejudiced, the Board directs that all ballots cast be segregated and the ballot box sealed, pending further direction of the Board.

13. All of the employees of the respondent in the voting constituency on June 13, 1984, who have not voluntarily terminated their employment or who have not been discharged for cause between that date and the date of the vote will be eligible to cast ballots.

14. Voters will be asked to indicate whether they wish to be represented by the applicant or the intervener or neither union in their employment relations with the respondent.

15. The matter is referred to the Registrar.

0155-84-M The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 463, Applicant, v. The Electrical Power Systems Construction Association (EPSCA) and **Ontario Hydro**, Respondents

Construction Industry Grievance — Employee's wife and children moving to Nova Scotia in anticipation of employee obtaining employment in that province — Employee remaining in Oshawa — Whether employee's "regular residence" in Oshawa or Nova Scotia for purposes of subsistence allowance

BEFORE: R. A. Furness, Vice-Chairman, and Board Members C. A. Ballentine and J. D. Bell.

APPEARANCES: *John Grant, Alex Ahee and Brian Christie for the applicant; Paul Jarvis and Ivor Starasts for the respondents.*

DECISION OF THE BOARD; July 12, 1984

1. The applicant has referred a grievance concerning the interpretation, application, administration or alleged violation of a collective agreement to the Board for final and binding determination.
2. The applicant has grieved that Harry E. Olsen, the grievor, has not been paid a subsistence allowance for room and board by Ontario Hydro contrary to the terms of a collective agreement.
3. In September of 1983, the grievor was employed by Ontario Hydro at its Darlington plant as a pipewelder. At that time Mr. Olsen resided with his wife and two of his four children at his residence at 1156 Valley Court in Oshawa, Ontario. Towards the end of September or during October of 1983, Mr. Olsen moved his wife and two children to Malagash, Nova Scotia. He rented a house in Malagash and his two children were placed in a school. It was the grievor's intention to move to Nova Scotia and obtain employment on oil rigs off the coast of Nova Scotia. Mr. Olsen sold his furniture and had his personal effects moved to Malagash. He remained in his house in Oshawa. After his personal effects had been moved to Malagash he retained only a bed, a stove and a refrigerator in his house in Oshawa. He lived in his house in Oshawa and made monthly payments on a mortgage on the house in Oshawa and also with respect to heat and electricity. He listed his residence in Oshawa for sale between October, 1983 and January, 1984. He was unable to sell his house in Oshawa. During the period between Christmas of 1983 and January, 1984, it became clear to Mr. Olsen that he was not going to be able to secure employment in Nova Scotia. His wife and two children returned from Malagash to Oshawa on March 24, 1984.
4. On December 16, 1983, the grievor executed an application for daily travel/room and board allowance. In the application he stated that the address of his regular residence was "R.R. 1, Malagash, Nova Scotia" and further stated that he commuted daily from "1156 Valley Court, Oshawa, Ontario". He claimed \$196.00 and provided a letter from a landlord and a telephone bill. In Mr. Olsen's testimony, there was no reference to his having spent any time in Malagash between September of 1983 and March of 1984. Mr. Olsen has resided at 1156 Valley Court, Oshawa since 1973 and when he commenced employment for Ontario Hydro he indicated that 1156 Valley Court, Oshawa, was his residence.

5. The applicant bases the grievor's entitlement to a subsistence allowance under article 28.2 of the collective agreement on the allegation that his regular residence is more than 97 radius kilometers from the project.

6. There is no dispute that the parties are bound by a collective agreement between The Electrical Power Systems Construction Association and The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, effective from May 1, 1982, until April 30, 1984. Article 28.2 of the collective agreement states:

28.2 ROOM AND BOARD

The following conditions will apply for employees whose regular residence* is more than 97 radius kilometers from the Project.

(a) An Employer may supply either:

- (i) free room and board in a camp or a good standard of board and lodging within a reasonable distance of a Project; or
- (ii) a subsistence allowance.

(b) An employee may exercise his option not to stay in a camp or accept free room and board. An employee who exercises this option shall receive a subsistence allowance as follows:

- (i) The Province will be divided into two regions for the payment of subsistence allowance: a Northern region and a Southern region. The Northern region is comprised of the geographic area established for the Atikokan Project. The Southern region is comprised of all remaining geographic areas except that described for the Northern region.
- (a) When an employee's regular residence is more than 97 radius kilometers from the Atikokan Project in the Northern region, the employees shall be paid a subsistence allowance of \$34.00 per day for each day worked or reported for.
- (b) When an employee's regular residence is more than 97 radius kilometers from the Project in the Southern region, the employee shall be paid a subsistence allowance of \$29.00 per day for each day worked or reported for.

* An employee's "regular residence" is the place where he maintains a permanent self-contained domestic establishment (a dwelling house, apartment or similar place of residence where a person generally sleeps and eats) in which he resides, and for which he can show proof of financial commitment.

7. This grievance primarily involves an interpretation of 'an employee's "regular residence"' in article 28.2. In that article three ingredients are induced in the concept of 'employee's

“regular residence”:

1. A permanent self-contained domestic establishment in which an employee resides.
 2. A place where a person generally sleeps and eats.
 3. A place for which he can show proof of financial commitment.
8. Mr. Olsen's residence at 1156 Valley Court in Oshawa clearly satisfies these three ingredients. He resided at that address in Oshawa where he slept and ate and for which he could show financial commitment in the form of monthly payments with respect to a mortgage, heating and electricity. On the other hand, there was no evidence that Mr. Olsen ever resided at or slept and ate at R.R. 1, Malagash, Nova Scotia. It may well be that his wife and two children had established a regular residence for themselves in Nova Scotia between September/October of 1983 and March of 1984. However, in our opinion, Mr. Olsen's regular residence and only residence was at 1156 Valley Court, Oshawa, for the period of time in question.
9. Mr. Olsen was engaged in preparing for alternative employment. It was his choice to seek such employment and to make suitable concurrent domestic arrangements. Ontario Hydro ought not to be required to finance its employees for alternative employment.
10. The Board finds that the grievor, Harry E. Olsen, had his regular residence at 1156 Valley Court, Oshawa, Ontario, and not at R.R. 1, Malagash, Nova Scotia. In these circumstances, he is not entitled to a subsistence allowance under the provisions of article 28.2 of the collective agreement. This grievance is dismissed.
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0604-84-R The Canadian Union of Public Employees, Applicant, v. **The Children's Aid Society of Owen Sound and the County of Grey**, Respondent

Certification — Practice and Procedure — Union membership filed falling one short of number required for outright certification — Union withdrawing application after vote directed — Re-filing with additional card — Second application not barred — But vote directed again

BEFORE: Ian C. Springate, Vice-Chairman, and Board Members I. M. Stamp and C. A. Ballentine.

APPEARANCES: *Helen O'Regan for the applicant; Chris Eames and Michael Cillis for the respondent.*

DECISION OF THE BOARD; July 10, 1984

1. The name of the respondent is amended to read: "The Children's Aid Society of Owen Sound and the County of Grey".
2. This is an application for certification.
3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
4. By way of this application the applicant is seeking to be certified for a unit of persons regularly employed by the respondent for not less than twenty-four hours per week and students employed during the school vacation period. On May 9, 1984 the applicant filed an earlier application for certification (File No. 0400-84-R) in which it requested that it be certified to represent all of the respondent's employees, subject only to certain specific exclusions not relevant to this discussion. In the course of dealing with that application, the parties reached agreement that it would be appropriate to divide the respondent's employees into two separate bargaining units, namely, one comprised of "full-time" employees and the other of "part-time" employees and students employed during the school vacation period. This agreement was accepted by the Board. In assessing the applicant's membership evidence, the Board concluded that while the applicant had filed sufficient membership evidence to entitle it to be certified outright with respect to the full-time bargaining unit, its membership evidence with respect to the part-time and student unit was sufficient only to qualify it for a representation vote. On May 23, 1984 the Board directed the taking of such a representation vote.
5. On May 31, 1984 the applicant applied to the Board to withdraw its earlier application insofar as it related to the unit of part-time employees and students. In response to this request the Board on June 1, 1984 issued the following decision:

"Having regard to the timing of the applicant's request to withdraw this application, the application is dismissed. The attention of the parties is directed to Practice Note No. 7 and the decision of the Board on *Mathias Ouellette* 55 CLLC ¶18,026."

In the *Mathias Ouellette* case the Board commented as follows:

"Where, after the taking of a representation vote directed by the Board, an application is dismissed because not more than 50 per centum of the ballots of all those eligible to vote were cast in favour of the applicant, the Board usually attaches to its decision a rider in the following words:

'The Board will not entertain an application for certification by the applicant in respect of any of the employees in the bargaining unit within the period of six months from the date hereof.'

It seems to us that a trade union should not be permitted to anticipate defeat in a representation vote and escape the consequences of defeat by seeking to withdraw its application after such a vote has been directed by the Board but before the vote has been taken. On the other hand, there have been a few cases the special circumstances of which have led the Board to refrain from imposing a bar upon an unsuccessful applicant even after a representation vote has been taken. Similar circumstances may exist in a case in which a union seeks leave to withdraw after the direction for the vote has been issued but before it is taken, but the existence of those circumstances might come to light only if the Board were to hold a hearing on the request for leave to withdraw an application. In our experience, we have found that a new application by a union which has made such a request is rarely filed within the six month period. Consequently, in order to avoid the necessity of a further hearing in each case where there may be a request to withdraw at the stage of the proceedings indicated above, the Board does not propose to impose an automatic six months' bar, as has been the practice in cases where a vote has been taken, but if the applicant union files a new application affecting the same employees within six months from the date when the application is dismissed, the onus will lie on the applicant to show that special circumstances do exist which would warrant the new application being entertained at that time. To avoid any misunderstanding, the principle of this case relates to situations in which a vote has been directed and in which the applicant union applies for leave to withdraw its application before the vote is taken."

6. The applicant filed the instant application for certification on May 31, 1984. As already indicated, by way of this application, it seeks to be certified for the same part-time employees and students as in the earlier application. In support of this application the applicant relies on the membership evidence initially filed in support of its earlier application as well as one additional membership card. This additional membership card is sufficient to bring the applicant's membership position to over the fifty-five per cent level required for automatic certification. At the hearing into this application the applicant contended that its purpose in obtaining and filing the additional card was to avoid the necessity of a representation vote, and that since it had now filed membership evidence on behalf of more than fifty-five per cent of the employees, it should be certified outright. The respondent, however, contended that on the basis of the *Mathias Ouellette* case the Board should refuse to consider the instant application and, in addition, impose a six month bar on any further applications by the applicant. At the hearing the Board concluded that this appeared not to be a case where the applicant had withdrawn its first application in anticipation of defeat in the representation vote. Accordingly, the Board orally rejected the contention that it should refuse to consider the instant application and impose a six month bar. The Board also ruled, however, that by way of a second

application the applicant should not be able to avoid a representation vote already directed by the Board, and that therefore, the Board would again be directing the taking of a representation vote.

7. The Board finds that all employees of the respondent in the County of Grey in the Province of Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except Confidential Secretary to the Director, Supervisors and persons above the rank of Supervisor, constitute a unit of employees of the respondent appropriate for collective bargaining.

8. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made were members of the applicant on June 15, 1984, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act. Nevertheless, in the exercise of its discretion under section 7(2) of the Act, the Board directs that a representation vote be taken of the employees of the respondent in the bargaining unit.

9. Those eligible to vote in the representation vote are all employees of the respondent in the bargaining unit on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken.

10. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.

11. The matter is referred to the Registrar.

0896-82-R General Workers Union, Local 1030 of the U.B.C. and J. of A., Applicant, v. **Rampart Enterprises Limited**, Respondent, v. Labourers' International Union of North America, Local 527, Intervener

Bargaining Unit — Certification — Construction Industry — Practice and Procedure — Carpenters, Local 1030 applying under section 144(1) for unit of construction labourers in all sectors — Subsequently amending to exclude ICI sector and to bring it under section 144(3) — Whether extension of terminal date warranted — Whether amendment casting doubt on membership evidence to cause direction of vote — Unit as amended appropriate for representation by Local 1030 where no other trades at work on application date

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members J. Wilson and H. Kobryn.

APPEARANCES: Douglas J. Wray and Frank Manoni for the applicant; B. W. Binning and B. J. Howard for the respondent; S. B. D. Wahl, D. Strang and B. Carrozzi for the intervener.

DECISION OF N. B. SATTERFIELD, VICE-CHAIRMAN, AND BOARD MEMBER H. KOBRYN; July 31, 1984

1. This is an application for certification made August 10th, 1982 in which the applicant ("Local 1030") was seeking to be certified for a bargaining unit comprised of all construction labourers employed by Rampart Enterprises Limited ("the employer") in all sectors of the construction industry in the Board's geographic area #15. Local 1030 was a recently formed trade union at the time. This application was one of a series of applications for certification which it began making in early 1982. Several of Local 1030's earlier applications raised some threshold issues, including the complex question of whether Local 1030 was an affiliated bargaining agent within the meaning of section 137(1) of the *Labour Relations Act*. That question affected, *inter alia*, whether a bargaining unit comprised of construction labourers was an appropriate unit for Local 1030 to represent in collective bargaining in the construction industry.

2. At the making of this application, the question of whether Local 1030 was an affiliated bargaining agent and the issues related to that question had not been decided by the Board. They were dealt with finally in the Board's decision in *Manacon Construction Limited*, [1983] OLRB Rep. July 1104. The proceedings herein were adjourned until those issues were resolved. The application finally came on for hearing on March 2nd, 1984 after several earlier scheduled hearings were adjourned at the request of and with the consent of the parties. The purpose of the hearing was to hear the evidence and representations of the parties with respect to all matters arising out of and incidental to the application for certification including the appropriate bargaining unit, whether the applicant is a trade union within the meaning of section 117(f) of the Act and whether the application was an application for certification within the meaning of section 119 of the Act.

3. The Board had concluded in the *Manacon* decision that Local 1030 was an affiliated bargaining agent of a designated employee bargaining agency and, therefore, was required to bring applications for certification which relate to the industrial, commercial and institutional (ICI) sector under section 144(1) of the Act. That section mandates a bargaining unit be comprised of:

“... all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection 3 or by voluntary recognition.”.

The decision dealt with five applications for certification by Local 1030, all of which were described in terms which would include construction labourers employed in the ICI sector of the construction industry. The Board concluded that those units would not be appropriate under section 144(1) because a unit of employees including construction labourers in the ICI sector represented by Local 1030 would not be comprised of all employees of the employer who would be bound by a provincial agreement. The Board reasoned also that section 146(2) of the Act would prevent Local 1030 from concluding a lawful collective agreement covering construction labourers employed in the ICI sector.

4. Between the making of the instant application and the March 2nd, 1984 hearing into it, there were several events which affect the context within which the issues in this application must be decided. Local 1030's solicitors addressed a letter dated September 22, 1983 to the Board in which, after referring to the conclusions in the Board's *Manacon* decision, commented and requested as follows:

“In the present case, we understand the employees in the bargaining unit were employed on three residential projects on the date of application which did not fall within the industrial, commercial or institutional sector of the construction industry.

We, therefore, request that the Board treat the application under *Section 144(3)* of the Act to exclude the industrial, commercial and institutional sector. It is our submission that this is an appropriate unit and is not affected by the Board's findings in the *Manacon* case.”

On August 10th, 1982, more than a year prior to the letter, notice in the customary form of the application for certification had been sent to the respondent together with copies of notices to the employees for posting at the employer's premises and job sites. The notices included the information that August 20th, 1982 had been set as the terminal date by which the employer was to file its reply and other information required by the Board and for the employees to file any statements in opposition to the application. It became necessary to have a Board Officer post the notices to employees and this was done on August 17th.

5. On August 23rd, 1982, the Board received a letter dated August 19th from the employer's solicitors advising the Board that the employer had received the notices of the application on August 19th and was seeking an extension of the time limits. The employer's reply, lists of employees and specimen signatures were eventually received on August 27th. The reply consented to the application being disposed of without the need for a hearing and agreed with the bargaining unit proposed by the applicant.

6. In the mean time, the Labourers' International Union of North America, Local 527 (“Local 527”) had made a separate application for certification on August 24th, 1982. The application was made pursuant to section 144(1) of the Act and the bargaining unit being sought by Local 527 conformed with the requirements of that subsection. The part of the bargaining unit relating to all sectors of the construction industry other than the ICI sector was described

in terms of the Board's geographic area #15. The Registrar advised Local 527 and the employer by letter dated August 26th that its application would not be processed until the Board had determined Local 1030's application. The next day, the Board received a telex from Local 527 requesting that the bargaining unit in its application be amended to exclude the ICI sector. In other words, Local 527 was seeking to represent construction labourers employed by the employer in Board Area #15 excluding the ICI sector. On September 14th, 1982, Local 527 filed an intervention in Local 1030's application.

7. Subsequent to the Board's decision issuing in *Manacon, supra*, Local 1030's solicitors made the request referred to above to amend the bargaining unit in its application. The employer and Local 527 responded to notice of that request by asking the Board to refuse it and to dismiss the application. The employer contended that it ought to be dismissed on the grounds that

"... *Section 144(3)* deals with the same bargaining unit description as is binding on the Employee Bargaining Agent with which the applicant is affiliated. Consequently, since Local 1030 cannot be certified pursuant to section 144(1), for reasons stated in the *Manacon* decision, they cannot seek certification under *section 144(3)*."

Local 527's solicitors put forward the following reasons why the Board should dismiss Local 1030's application:

"The Application for Certification herein clearly attempts to obtain bargaining rights in respect of construction labourers in the Industrial, Commercial and Institutional sector of the construction industry pursuant to Section 144(1). As acknowledged by counsel for the Carpenters, the Board has ruled that Carpenters' Local 1030 "may not become certified in the Industrial, Commercial and Institutional sector of the construction industry or [sic] other than millwrights or carpenters". (See *Manacon Construction Limited* [1983] O.L.R.B. Rep. Mar. 407 and the reconsideration decision dated July 13, 1983). This of course would include bargaining rights in respect of construction labourers in the ICI sector and accordingly, this Application for Certification is no different from those dismissed in the course of the *Manacon Construction Limited* decision. At this late date the Applicant should not be permitted to transform its Application which clearly attempted to obtain bargaining rights in the Industrial, Commercial and Institutional sector of the construction industry pursuant to Section 144(1) to an application which excludes Industrial, Commercial and Institutional sector bargaining rights pursuant to Section 144(3). The Board specifically dismissed the Applications for Certification in respect of *Manacon Construction Limited*, ... in precisely similar circumstances."

8. At the commencement of the hearing on March 2nd, 1984, counsel for Local 1030 challenged the status of Local 527 to intervene in this application. The Board heard and considered the submissions of the parties and ruled that Local 527 be made an intervener in the proceedings.

9. With respect to the issue of whether a bargaining unit comprised of construction labourers, excluding those employed in the ICI sector of the construction industry, would be an appropriate unit to be represented in collective bargaining by Local 1030, the parties

elaborated the arguments set out in their replies to Local 1030's request to amend the bargaining unit, but the thrust of their arguments remained the same.

10. The Board had precisely that question before it in *Rolland Duquette Construction*, [1983] OLRB Rep. Nov. 1884. In that case, Local 1030 had applied under subsection 3 of section 144 of the Act to be certified to represent a unit of construction labourers in the Board's geographic area #15, the same area being sought in the instant application. Local 527 was an intervener in that application and opposed the bargaining unit on the same grounds as here; that is, the appropriate bargaining unit in an application made under section 144(3) by an affiliated bargaining agent is the same trade unit to which that affiliated bargaining agent would be entitled in an application made under section 144(1). The Board's response to that argument is set out in paragraph 8 of the decision in the following terms:

8. On a review of the language of section 144(3), we are satisfied that the subsection does not restrict Carpenters Local 1030 from bringing an application for certification for a bargaining unit which encompasses construction labourers employed outside of the ICI sector. In our view, had it been the intent of the Legislature to apply the same restrictions with respect to non-ICI bargaining units, as it did for units that relate to the ICI sector, it would have done so through express language in the Act, and since it has not done so, it would be inappropriate for the Board to imply any such restrictions. In this regard, we would note that whereas there exists a legislatively mandated scheme of what might loosely be termed as single-trade multi-employer bargaining in the ICI sector, no such similar mandated scheme exists with respect to the other sectors of the construction industry. Accordingly, the certification of unions "across craft lines" in the non-ICI sectors of the construction industry will not likely have the same type of disruptive effect that the Board referred to in the *Manacon* case.

11. The Board in *Duquette* then went on to find that Local 1030 was entitled to bring an application for certification with respect to construction labourers employed outside of the ICI sector commenting as follows:

11. Having regard to the above, we are satisfied that Carpenters Local 1030 is entitled to bring an application for certification that relates to construction labourers employed outside of the ICI sector. This is *not* to say that the Local is as of right entitled to be certified for a unit described in terms of construction labourers, for it is not. In our view, pursuant to section 6(1) of the Act, the appropriate bargaining unit is one that encompasses *all* unrepresented trades in the employ of the respondent on the application date. As it happens, the only trades employed by the respondent on the application date were carpenters and construction labourers, and the carpenters were already represented by another local of the United Brotherhood of Carpenters and Joiners of America. This being so, the only unrepresented employees of the respondent were construction labourers. Accordingly, in the circumstances of this case, a unit described in terms of construction labourers would be appropriate.

12. The Board's reasoning in the *Duquette* decision that Local 1030 was entitled to bring an application for certification under section 144(3) of the Act for a unit of employees which

the Board, pursuant to section 6(1) of the Act, found to be appropriate for collective bargaining purposes is wholly applicable to the facts in the instant application. The uncontradicted evidence herein is that the employer was employing unrepresented construction labourers on the date of application. There is no evidence before the Board of any other unrepresented trades being employed at that time. Accordingly, the Board adopts the reasoning in *Duquette* and finds that a unit of the employer's construction labourers would be an appropriate one for representation by Local 1030.

13. Counsel for Local 527 argued at the hearing on two grounds that the Board should set a new terminal date for Local 1030's application and re-post the notices to the employees. First, the terminal date originally set by the Board did not allow an adequate period of time between sending of notices to the parties, including the notices to be posted for employees, for the filing of timely replies, interventions or objections to the application. Since August 20th was a Friday, even if the Board had extended the terminal date for only two more working days, counsel argued, it would have given the parties until August 24th for responding to the application. (The Board notes that would also have resulted in the Board treating Local 527's application which was made on August 24th as though it had been made on the date of Local 1030's application). Second, the terminal date should be extended to allow notice of the amended bargaining unit proposed by Local 1030 to be given to the employees affected by the application. The lists filed by the respondent contain the names of nine employees employed in the bargaining unit originally sought by the applicant. They were employed on three job sites in the Ottawa area. In the Board's view and having regard to the relatively small size of the unit, the posting of the Board's notice to employees of the application allowed adequate time for employees who were opposed to it to file statements in opposition. None were filed. In this respect, see the Board's decision in *Thames Steel Construction Ltd.*, [1979] OLRB Rep. May 440 and *Macdonnell Memorial Hospital*, [1979] OLRB Rep. Oct. 996. Since the intervention filed by Local 527 and the reply and lists of employees filed by the respondent have been accepted and processed by the Board, they have not suffered any prejudice from the terminal date set by the Board. Were the Board to extend the terminal date now it would have the same result with respect to Local 527's application as having extended the terminal date in the first instance to August 24th, 1982. In other words, it would bring Local 527's application within reach of the Board's policy that a subsequent application for certification made not later than the terminal date of an earlier application be treated as though it had been made on the date of the earlier application. That is how the Board exercises its discretion under section 103(3)(a) of the Act.

14. If that were done in this case and Local 527 had the requisite membership support, the Board would direct a representation vote to allow the employees to indicate whether they wished Local 1030, Local 527, or neither trade union to represent them. That result is reason neither to extend the terminal date nor to refuse to do so. Rather, it is a matter of whether there is a need to extend the terminal date. The Board has already determined that the service of notices on the parties does not give rise to a need to extend the terminal date. Counsel for Local 527 argues that it should be extended because of the amendment of the original bargaining unit. The Board disagrees. The change in the description of the unit standing alone does not create a need to extend the terminal date. The nature of the change is not such that there would be employees affected by the amended unit who did not have notice of the application in the first instance. Nor does the change by itself make the original application misleading. Therefore the Board declines to extend the terminal date on the second ground argued by counsel and the terminal date remains as originally set by the Board.

15. Counsel for Local 527 argued further that the impact of the bargaining unit amendment would warrant giving the employees an opportunity in a representation vote to decide whether they still wish to be represented by Local 1030 because, when they first sought to be represented by it, they expected Local 1030 to be able to represent them in the ICI sector. That, counsel contends, is an important factor in selecting a bargaining agent in the construction industry because the most beneficial earnings and work opportunities are in that sector. Had the employees known that Local 1030 was unable to represent them in the ICI sector, they might not have selected it as their bargaining agent. Therefore, he argues, even if Local 1030 has the requisite membership support to be certified without a representation vote, the Board should direct a vote in order to confirm whether Local 1030 still enjoys their support. In effect, counsel is asking the Board to speculate as to the employees' reasons for becoming members of Local 1030. Absent duly particularized allegations of misrepresentation, intimidation or threats, the Board is not prepared to inquire into the reasons why employees join a trade union and it is not prepared to do so in the circumstances herein.

16. The lists filed by the employer contained the names of nine persons, eight of whom were at work on the date of the application, all designated by the employer to be labourers. Local 1030's claim that none of them were working in the ICI sector is uncontradicted. Therefore, they would be employees coming within the amended bargaining unit. Counsel for the employer advised the Board that the employer employed a superintendent, two foremen, R. Verdon and L. Delango, and one other employee, K. Smith, during the week in which the application was made. He could not assist the Board with information as to whether they were at work on the date of the application. Nor could counsel advise the Board whether another employee, T. Marshall-Taylor, who was at work as a labourer on August 24th, 1982, when Local 527's application was made, was at work on August 10th when Local 1030 made its application. Counsel for Local 527 requested the Board to examine the employer's records and, if they reveal that any of Verdon, Delango, Smith, Marshall-Taylor and W. Gouchie, who was listed by the employer as not being at work on August 10th, were at work on August 10th, to inquire into whether they were employees in the bargaining unit. The challenges to the lists with respect to Gouchie and Marshall-Taylor are ones which reasonably would cause the Board to make the type of inquiry requested. That is not the situation with respect to Verdon, Delango and Smith. Having regard to the fact that the parties had been given notice in November, 1983 that both applications were being listed for hearing, the parties had ample time in which to make their own inquiries into the number of construction labourers at work on August 10th at least to the point of being able to allege some material facts on which to found a proper challenge. Such material facts were not alleged with respect to Verdon, Delango and Smith and the Board will not contribute to further delay in determining this application by making the requested inquiry with respect to those three persons.

17. Accordingly, with respect to W. Gouchie and T. Marshall-Taylor, a Board Officer is authorized to inquire into and report to the Board on the lists filed by the respondent.

DECISION OF BOARD MEMBER J. WILSON;

The decision of Board member J. Wilson will issue at a later date.

3133-83-R Henry Snow, Applicant, v. Sheet Metal Workers International Association Local No. 285 Union, Respondent, v. **Rennie Sheet Metal Limited**, Intervener

Construction Industry — Practice and Procedure — Termination — “bargaining unit defined in a collective agreement” in section 57(2) not interpreted literally — Employee outside geographic scope of unit represented by union not entitled to apply for termination

BEFORE: Owen V. Gray, Vice-Chairman, and Board Members J. D. Bell and H. Kobryn.

APPEARANCES: *Henry B. Snow for the applicant; Arthur L. Moore, Gerry Edelenbos and Maurice Soueier for the respondent; Murray Thompson for the intervener.*

DECISION OF THE BOARD; July 3, 1984

1. This is an application under section 57 of the *Labour Relations Act* for a declaration that the respondent trade union no longer represents the employees in the bargaining unit for which it is the bargaining agent. The respondent trade union claims that the applicant has no status to bring this application, as he was not at any material time an employee in the bargaining unit of employees of the respondent for which the respondent claims to be the bargaining agent.

2. Subsection 2 of section 57 provides:

(2) Any of the employees in the bargaining unit defined in a collective agreement may, subject to section 61, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit,

. . .

The balance of the text of that subsection sets out timeliness requirements which such an application must meet. Subsection (3) of section 57 provides:

(3) Upon an application under subsection (1) or (2), the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and whether not less than 45 per cent of the employees in the bargaining unit have voluntarily signified in writing at such time as is determined under clause 103(2)(j) that they no longer wish to be represented by the trade union, and, if not less than 45 per cent have so signified, the Board shall, by a representation vote, satisfy itself that a majority of the employees desire that the right of the trade union to bargain on their behalf be terminated.

This subsection contemplates that an applicant will file with his application a document or documents signed by one or more employees in the bargaining unit indicating that they no longer wish to be represented by the trade union. The only such document in this case is Mr. Snow's application in Form 17, in which he states in paragraph 5 under “Other relevant statements”:

I would like to get de-certified from this union so we can get more work.

The only signature on the application is that of Mr. Snow.

3. The first thing the Board must ascertain on any application of this type is what is "the bargaining unit" affected by the application. Form 17 requires an applicant to set out "the unit of employees for which the respondent is the bargaining agent". In this application Mr. Snow answered:

The area is Toronto & District ZONES 1, 2 and 3.

In an undated letter received by the Board April 13, 1983, Mr. Snow requested that this be amended to read:

From all employees of the employer as defined in article #1 of this agreement, in the Province of Ontario, save and except those above the rank of working foremen, office and sales staff.

In its Reply, the respondent trade union describes the unit of employees for which it is the bargaining agent as:

All journeymen sheet metal workers and registered sheet metal apprentices employed in the residential sector of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, the Towns of Ajax and Pickering in the Regional Municipality of Durham.

4. Asked by the Board to trace the origin of its bargaining rights with respect to employees of Rennie Sheet Metal Limited (hereafter called "Rennie"), the respondent (hereafter called "Local 285") produced a collective agreement dated January 5, 1981 to which it is a party and in which Rennie, M & W Sheet Metal and S & S Sheet Metal Co. are parties collectively described therein as "employer". The relevant provisions of that agreement are as follows:

ARTICLE 1 — DEFINITIONS

1.1 "Association" means the Residential Sheet Metal Contractors Organization.

. . .

1.3 "Employee" means a certified journeyman sheet metal worker recognized by the Union, or a registered apprentice, and employed by an Employer in the shop or on a job site.

1.4 "Employer" means any member of the Association covered by this Agreement and any contractor in the sheet metal industry who is bound by this Agreement, and any successor or assign.

. . .

1.7 "Union" means the Sheet Metal Workers' International Association, Local Union #285.

• • •

ARTICLE 5 — RECOGNITION — UNION SECURITY

5.1 The Employer recognizes the Union as the exclusive bargaining agent for all employees of the Employer as defined in Article 1 of this Agreement, in the Province of Ontario, save and except those above the rank of working foremen, office and sales staff.

5.2 The Union recognizes the Association as the exclusive bargaining agent for all Employees who are members of the Association and for whose employees the Union has bargaining rights, and any other Employer who has, in writing, appointed the Association as its bargaining agent.

5.3 Any Employer who is not a member of the Residential Sheet Metal Contractors Organization and who desires to employ members of Local Union #285, shall be required to accept this Agreement and be governed by all of its provisions.

• • •

ARTICLE 30 — DURATION

30.1 This Agreement shall be effective from May 15, 1980 and shall remain in effect until the 30th day of April, 1982 and shall continue in force and effect from year to year thereafter unless in any year not more than 90 days and not less than 60 days before the date of its termination either party shall furnish the other with written notice of their desire to terminate or amend this Agreement.

The following appears on the signature page of this agreement:

Note: Subject to agreement with LABOUR RELATIONS BOARD re: Zone 8 signed between yourself and Matthews, Dinsdale and Fishbane and the LABOUR RELATIONS BOARD.

5. Local 285 and Rennie advised us that the agreement referred to in this Note is recited in a decision of the Board dated January 8, 1981 (Board File #1860-80-R), which reads as follows:

1. This is an application under section 55 of *The Labour Relations Act*. The applicant has also pleaded section 1(4) of the Act in the alternative. Prior to the hearing in this matter which was scheduled for January 7, 1981, the parties reached the agreement set out below.

MINUTES OF SETTLEMENT AND CONSENT ORDER

The parties to the above application under section 55 and/or Section 1(4) of *The Labour Relations Act*, R.S.O. 1970, c. 232, as amended (the "Act") before the Ontario Labour Relations Board (the "Board") each agree with the other to settle this matter upon the following terms and conditions and to request the Board to endorse its records and issue the following declarations and orders:

1. A DECLARATION that S. & S. Sheet Metal Co., M. & W. Sheet Metal and Rennie Metal Limited are bound to the Collective Agreement between the Residential Sheet Metal Contractors' Organization and Sheet Metal Workers' International Association, Local Union 285, (the "Collective Agreement") in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton, in the County of Halton, and the Township of Pickering, in the County of Ontario ("O.L.R.B. Area No. 8");

2. AN ORDER that S. & S. Sheet Metal Co., M. & W. Sheet Metal and Rennie Sheet Metal Limited and the applicant execute the collective agreement effective from January 5, 1980, which collective agreement shall incorporate the terms and conditions of the Collective Agreement referred to in paragraph 1 above.

3. A DECLARATION that one employee continuously in the employ of S. & S. Sheet Metal Co., M. & W. Sheet Metal or Rennie Sheet Metal Limited outside of O.L.R.B. Area No. 8 may be employed within O.L.R.B. Area No. 8 pursuant to the terms and conditions of the collective agreement. The applicant shall assess the employee \$25.00 upon entering O.L.R.B. Area 8.

4. AN ORDER that S. & S. Sheet Metal Co., M. & W. Sheet Metal and Rennie Sheet Metal Limited apply the full terms and conditions of the collective agreement at all projects that they may now or hereafter be engaged at in O.L.R.B. Area No. 8.

5. A DECLARATION that the grievance dated November 7, 1980, filed by the Sheet Metal Workers' International Association, Local Union 285, against S. & S. Sheet Metal Co. is withdrawn.

DATED at Toronto, this 6th day of January, 1981.

THE SHEET METAL WORKERS' S. & S. SHEET
INTERNATIONAL ASSOCIATION,
LOCAL UNION 285

Per: *John Kurchak* Per: *Larry Thompson*

M. & W. SHEET METAL

Per: *Larry Thompson*

RENNIE SHEET METAL LIMITED

Per: *Larry Thompson*

In view of the aforesaid agreement of the parties, these matters are terminated.

It is apparent that a declaration in the form of paragraph 1 and an order in the form of paragraph 4 would have added nothing to the force and effect of the parties' agreement to those terms. It is also apparent that the Board would have no jurisdiction to grant any relief of the sort contemplated by paragraphs 2, 3 and 5, although those are all terms on which the parties could have, and had, made agreement. It is not unlikely that these observations explain why the Board's decision contained no formal declaration or order of the sort contemplated by the Minutes of Settlement but, instead, merely terminated the proceedings.

6. In or about March, 1982 the Residential Sheet Metal Contractors Organization (hereafter called "the Association") applied to the Board (Board File No. 2521-81-R) for accreditation as the bargaining agent for certain employers who had a bargaining relationship with Local 285. In its decision of September 23, 1982, the Board granted the Association accreditation with respect to a bargaining unit described as follows:

all employers of employees for whom the respondent [Local 285] has bargaining rights in the residential sector of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham.

S & S Sheet Metal Co. was one of the employers affected by the application, and paragraph 11 of the Board's decision provided:

11. Having regard to the representations of the parties and pursuant to section 1(4) of the Labour Relations Act, the Board finds that S & S Sheet Metal Co., M & W Sheet Metal and Rennie Sheet Metal are one employer for the purposes of this application.

In the meantime, on June 23, 1982, Local 285 and the Association executed a new collective agreement covering the period May 1, 1982 to April 30, 1984 ("the Association agreement"). Articles 1.1, 1.3, 1.4, 1.7, 5.1, 5.2 and 5.3 of that agreement are identical to the correspondingly numbered articles of the agreement referred to in paragraph 4 of this decision.

7. At the hearing in this matter, Mr. Thompson advised the Board that Rennie's business is located in Hamilton, Ontario and that its shop employees do all their work at that location. He further advised the Board that Rennie had had no employees working in Board Area 8 (the

geographic area covered by the accreditation order of September 23, 1982) at any time material to this application. It had, nevertheless, filed a list of employees naming one employee, John Ozimek, as an employee falling within the bargaining unit. The employer regarded Mr. Ozimek as the "one employee" provided for in paragraph 3 of the Minutes of Settlement quoted in paragraph 5 of this decision. As the employer understood it, that agreement allowed it to use one of its own Hamilton based employees to do shop work in Hamilton in conjunction with on-site work at projects in Board Area 8, rather than having to hire a Local 285 member from Toronto for that purpose. Mr. Ozimek had been a member of Local 285, and the employer had been making appropriate deductions and remittances on his behalf, since 1981; in the intervenor's mind these circumstances were related to the special provision in paragraph 3 of the aforementioned Minutes of Settlement. As noted earlier, that provision had been incorporated by reference into the collective agreement of June 9, 1981 to which Rennie was a named party. Local 285 also took the position that Ozimek was within the bargaining unit. It acknowledged to the Board that the agreement of June 23, 1982 had superceded that of January 9, 1981, and that the Association agreement was the only agreement binding on Rennie. The respondent does not consider it has any obligation to represent any employee of Rennie with respect to employment outside of Board Area 8.

8. The applicant Henry Snow told the Board that he is a sheet metal worker working at the Rennie's shop in Hamilton. He took no issue with any of the above-recited information supplied to the Board by the respondent and intervenor. He told the Board he was not involved in any sheet metal work at sites within Board Area 8. He said he had brought this application because he felt the existence of Local 285's bargaining rights adversely affected his employment: his hours of work had been shortened because his employer could not use its Hamilton shop people to do fabrication work for Toronto area jobs. He felt this was because the agreement with Local 285 required that shop work for Toronto jobs be performed by members of Local 285. He thought that if Local 285 was decertified, he would have more work. It is not immediately apparent how the existence of Local 285's bargaining rights adversely affects Mr. Snow's economic interests. It is not unreasonable to suppose that the availability to Rennie of Toronto area work will depend, in part at least, on its being in a contractual relationship with Local 285. Even if Mr. Snow has an economic interest in the existence of Local 285's bargaining rights, however, that alone does not give him status to bring an application to terminate those rights. Such an application can only be brought by an employee in the relevant bargaining unit.

9. There is no evidence that the 1981 agreement was renewed by the parties to it, unless by operation of article 30 thereof. Accordingly, the effect of the accreditation order was to bind the employer to the agreement of June 23, 1982 between Local 285 and the Association, with effect either on the date of the accreditation order (if the 1981 agreement was not renewed by any means) or on May 1, 1983 (if the first agreement renewed itself by default for a one year period commencing May 1, 1982): see section 128(2) of the Act. However, the parties were all in agreement that Rennie was at no time a member of the Association. The Association, therefore, had no authority to agree on Rennie's behalf to an extension of the trade union's bargaining rights beyond those with which the accreditation order dealt, just as an employer's association which is also a designated employer bargaining agency could not bind a non-member employer to a provincial agreement with respect to any sectors of the construction industry other than the industrial, commercial and institutional sector: *Fred Jantz Masonry Construction Company Limited*, [1981] OLRB Rep. Sept. 1229. Accordingly, the bargaining unit of employees of this employer to whom the collective agreement applies is limited to employees of the employer in Board Area 8 (in sectors other than the ICI sector).

10. The relevant bargaining unit in a termination application is described in section 57(2) as "the bargaining unit defined in a collective agreement". Read in isolation, article 5.1 of the Association agreement might suggest that any employee of the employer in the Province of Ontario would be eligible to make such an application. However, the Board has not interpreted the words "the bargaining unit defined in a collective agreement" in a literal way, when to do so would lead to the Board's considering the wishes of persons other than employees for whom the respondent trade union has bargaining rights. For example, the agreements which result from the scheme of province-wide bargaining contemplated in sections 137 to 151 of the *Labour Relations Act* typically define the bargaining unit in terms of employees of all employers represented by the designated or accredited employer bargaining agency concerned, but the Board has held that the represented employees of a single employer make up the bargaining unit referred in the various subsections of section 57 for the purpose of a termination application: *Clarence H. Graham Construction Limited* [1982] OLRB Rep. Aug. 1147. The same approach applies here. "Bargaining unit", for the purpose of section 57, is a unit consisting only of those of the employer's employees whom the trade union is entitled to represent. Based on the facts outlined by the trade union and conceded by the other parties to this application, we are satisfied that the respondents bargaining rights are limited to the bargaining unit it described in its Reply to this application. Mr. Snow is not an employee in that bargaining unit. It is not necessary for us to determine whether Mr. Ozimek (or anyone else) would fall within that bargaining unit.

11. At the conclusion of the Board's hearing on June 6, 1984, the parties were advised that the application would be dismissed on the ground that the applicant was not an employee in the relevant bargaining unit. We hereby confirm that ruling.

12. This application is, accordingly, dismissed.

0316-84-R Steve Crowe, Fred Downer and Mel Davis, Applicants, v. International Union of Bricklayers and Allied Craftsman Local #17, Respondent, v. Stuart Riel Masonry Contractor, Intervener

Construction Industry — Practice and Procedure — Termination — Application to terminate bargaining rights in ICI sector affecting all affiliated bargaining agents — Employee bargaining agency entitled to notice of application — Hearing adjourned to permit notice

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members C. A. Ballentine and I. M. Stamp.

DECISION OF THE BOARD; July 19, 1984

1. The Board issued an interim decision on July 5th, 1984 in this application for a declaration terminating the bargaining rights of the International Union of Bricklayers and Allied Craftsman, Local #17 ("Local 17"). The Board's reasons for its decision were to follow in writing and that is the purpose of this decision.

2. The application was scheduled to be heard by the Board at 9:30 a.m. on Tuesday, July 3rd, 1984. At that time, no one appeared to represent Local 17. When the hearing was convened at 10:10 a.m. on July 3rd, there was still no one appearing for Local 17. The Board was advised, at that time by a lawyer from the solicitors for the Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen ("the Conference") that a representative of the Conference was on his way to the hearing. Consequently, the Board advised the applicants and counsel for the respondent that it would stand the application down until 10:45 a.m. When the Board convened the hearing at 10:45 a.m., no one was present to represent Local 17 and no one had appeared from the Conference. The Board commenced the hearing but expressed the caution to the parties that, should the representative of the Conference appear at the hearing, the Board would hear his representations. Should it be determined that the representative was appearing on behalf of Local 17, he would have to take the hearing as it was at that point in time. On the other hand, different consequences would follow should the Conference be a party which was entitled to notice of the application.

3. Subsequently, a representative of the Conference appeared at the hearing together with counsel just as the Board had completed examining the first witness for the applicants. The Conference is a council of trade unions comprised of the Ontario locals of the International Union of Bricklayers and Allied Craftsmen ("the International"), so Local 17 is a constituent local of the Conference. The International and the Conference together, constitute the employee bargaining agency designated pursuant to clause (a) of section 139(1) of the *Labour Relations Act* to represent in bargaining all journeymen and apprentice bricklayers, stonemasons and plasterers for whom the International, the Conference and their constituent local unions are the exclusive bargaining agents in the industrial, commercial and institutional ("ICI") sector of the construction industry in the Province of Ontario. As the designated employee bargaining agency, the International and the Conference constitute the "union" party to the provincial agreement applying to journeymen and apprentice bricklayers, stonemasons and plasterers in the ICI sector of the construction industry in the Province of Ontario. This is the only collective agreement permitted by the Act for members of those trades when the International, the Conference or their affiliated locals hold bargaining rights for them in the ICI sector. The

International, the Conference and their affiliated locals are affiliated bargaining agents within the meaning of clause (a) of section 137(1) of the Act.

4. Counsel for the Conference submitted that, because the Conference represented the designated employee bargaining agency and as such was a party to the provincial agreement which sets out the bargaining rights of Local 17, the Conference was a party with a direct legal interest in the proceedings and should have received notice of the application and of the hearing. The Board heard the corresponding submissions from the applicants and counsel for the employer.

5. Before dealing with the submissions of the parties, it is useful in the Board's view to outline briefly the history of the collective bargaining relationships in operation here. Prior to the appearance of the Conference's representative, the first witness for the applicants had told the Board that he believed Local 17 had been certified to represent employees of the employer approximately two years ago after Local 17 had made an application for certification which had gone unopposed by the employer or any of the employees. Shortly after the Board's certificate issued, the employees and the employer learned that the employer had been bound automatically to a collective agreement applying in the ICI sector of the construction industry. From that time on, according to witness, the employer ceased performing work in the ICI sector. Instead, the employer worked only in the residential sector and that is the sector in which the employees who are affected by this application were working when it was made. Furthermore, witness claims that he and the other applicants are not members of Local 17, have never been approached to become members of Local 17 and had not seen any representative of Local 17 since they became aware that it had been certified by the Board as the exclusive bargaining agent for the employer's bricklayers and stonemasons and their apprentices.

6. The Board's records show that the application for certification was made by Local 17 on December 2nd, 1981. The application resulted in the Board issuing two certificates pursuant to section 144(2) of the Act to Local 17 with respect to bricklayers and stonemasons and their apprentices employed by the respondent. One certificate was issued to Local 17 on its own behalf and on behalf of all other affiliated bargaining agents of the designated employee bargaining agency (the International and Conference) with respect to the bricklayers and stonemasons and their apprentices employed in the ICI sector in the Province of Ontario. The other certificate was issued to Local 17 with respect to all bricklayers and stonemasons and their apprentices employed by the employer in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, excluding the ICI sector.

7. With the issuing of the certificate with respect to the ICI sector, the employer became immediately bound by the provincial agreement then in effect between the International and the Conference, as the employee bargaining agency, and The Masonry Industry Employers Council of Ontario, as the employer bargaining agency, by operation of section 145(4) of the Act. No similar statutory result occurs with respect to the other certificate. In order for the parties to be bound to a collective agreement with respect to the bargaining unit set out in the second certificate, the parties must execute a collective agreement or otherwise act to bind themselves to an appropriate existing collective agreement. In this respect see the Board's decision in *Fred Jantz Masonry Construction Company Limited*, [1981] O.L.R.B. Rep. Sept. 1229. If the parties fail to conclude a collective agreement or bind themselves to a collective

agreement, the employees in the bargaining unit described in the certificate can apply to terminate the bargaining rights of the trade union pursuant to section 123(1) of the Act.

8. Counsel for the Conference contends that the employer became bound to the bricklayers provincial agreement between the parties referred to above which was in effect from May 1, 1980 to April 30, 1982 insofar as it applied to the ICI sector of the construction industry. Council submits, however, that the provincial agreement is not limited to the ICI sector, rather it is an agreement without reference to sector and applies to all sectors of the construction industry. The employer signed minutes of settlement with respect to a grievance referred to the Board under section 124 of the Act by the Conference on its own behalf and on behalf of all of its affiliated bargaining agents on August 4th, 1982 for final and binding arbitration. In those minutes of settlement, the employer agreed that the Board should issue a declaration that the employer was bound by the provincial agreement. The Board's decision which issued October 12th, 1982 declared:

“... that Stuart Riel Masonry Contractor (“Riel”) is bound to the provincial collective agreement between the International Union of Bricklayers and Allied Craftsmen and the Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and the Masonry Industry Employers’ Council of Ontario, effective from May 1, 1982 until April 30, 1984 (the Collective Agreement);”

Therefore, according to counsel, the employer is bound by the provincial agreement for all sectors of the construction industry in the Province of Ontario. Since the Conference and the International are the “union” party to the agreement, the Conference was entitled to notice of these proceedings and should be made a party thereto. Furthermore, counsel contends that the notice to Local 17 was mailed to the address of its former business representative who, at the time, was president of Local 17 and not the incumbent business representative. In the result, counsel argues that Local 17 has not had proper notice of the proceedings. Therefore, in the absence of proper notice to Local 17 and the Conference, the Board should adjourn the hearing, serve proper notice on those two parties and commence the proceedings anew.

9. Counsel for the employer argued that whether the Conference was entitled to notice or not, proper notice was served on Local 17 and, since it is a constituent local of the Conference, that notice is also proper notice to the Conference. In those circumstances, according to counsel, the Board can and should proceed with the hearing into this application. The applicants adopted the same position as counsel for the employer with respect to notice to Local 17. Moreover, since the applicants already had appeared twice before the Board on an earlier application for termination of bargaining rights which was dismissed as untimely, the Board should not grant an adjournment in the instant application and should continue to hear and determine it.

10. After adjourning to consider the submissions of the parties, the Board ruled orally as follows:

- (1) The provincial agreement between the International Union of Bricklayers and Allied Craftsmen and the Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and the Masonry Industry Employers Council of Ontario is an agreement without reference to sectors of the construction industry and therefore it applies to all sectors of the construction industry.

- (2) The Board's decision which issued October 12th, 1982 declared the employer to be bound to the provincial agreement effective from May 1, 1982 until April 30, 1984, the same agreement which was in effect at the making of this application. The effect of that declaration is to bind the employer to the provincial agreement and, there being no limitations to the binding nature of the provincial agreement expressed in the declaration, the employer is bound to it with respect to all sectors of the construction industry.
- (3) The bargaining rights contained in the provincial agreement with respect to the ICI sector extend to all affiliated bargaining agents of the Employee Bargaining Agency. Consequently, if a declaration terminating bargaining rights were to issue with respect to the ICI sector, it would extinguish the bargaining rights in that sector for all of the affiliated bargaining agents. Therefore, since the bargaining rights in the ICI sector of all of the affiliated bargaining agents may be affected by this application, they are entitled to notice of the application and of hearings into the application.
- (4) Since the International Union of Bricklayers and Allied Craftsmen and the Ontario Provincial Conference of the International Union of Bricklayers and Craftsmen, as the designated Employee Bargaining Agency, is the agent for all of the affiliated bargaining agents for purposes of bargaining and concluding a provincial agreement, notice to the Employee Bargaining Agency may be deemed notice to all of the affiliated bargaining agents.
- (5) In the result, the Board will adjourn these proceedings so that notice of the application and of hearing into the application can be served on the International Union of Bricklayers and Allied Craftsmen and the Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, as the Employee Bargaining Agency unless the Conference consents to the Board proceeding with the hearing.

11. Since consent to continue the hearing was not forthcoming, it was adjourned and is to be continued in Peterborough, Ontario on a date to be set by the Registrar in consultation with the parties.

12. These are the reasons for the Board's interim decision which issued on July 5th, 1984.

0159-84-R Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, Applicant, v. **T. Eaton Company Limited**, Respondent, v. Group of Employees, Objectors

Certification — Membership Evidence — Natural Justice — Practice and Procedure
 — Reconsideration — Letter of withdrawal from membership sent to union with copy to Board
 — Board treating letter as petition and disregarding where objector failing to appear at hearing
 — No breach of natural justice — Employer not permitted to add to employee list after count announced at meeting with Board officer — Board not reconsidering certificate

BEFORE: Robert D. Howe, Acting Chairman and Board Members W. G. Donnelly and S. Cooke.

DECISION OF ROBERT D. HOWE, ACTING CHAIRMAN AND BOARD MEMBER S. COOKE; July 6, 1984

1. In a decision dated May 4, 1984 in respect of this application for certification, the Board wrote as follows:

1. This is an application for certification in which representatives of the applicant and the respondent met with a Board Officer prior to the hearing scheduled in this matter, reached agreement on all matters in dispute between them, and agreed to waive their right to a formal hearing in the matter.

2. No one appeared on behalf of the objectors at the time set for the commencement of the hearing or within one half-hour thereafter. Therefore, the Board, pursuant to section 73(5) of its Rules of Procedure, will dispose of this application without considering the statements of desire filed by the objectors.

3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

4. Having regard to the agreement of the parties, the Board further finds that the following constitute units of employees of the respondent appropriate for collective bargaining:

All employees of the respondent at its retail store at 3003 Danforth Avenue, Metropolitan Toronto, save and except Sales Managers, Merchandise Presentation Managers, Food Service Managers and Foremen, persons above the rank of Sales Manager, Merchandise Presentation Manager, Food Service Manager or Foreman, office and clerical staff, employees of Eaton Travel Ltd., management trainees, Personnel Supervisor, Security Staff, Medical Services Nurse, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period and students employed on a co-operative programme with a school, college or university ("bargaining unit #1");

all employees of the respondent regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period, at the respondent's retail store at 3003 Danforth Avenue, Metropolitan Toronto, save and except Sales Managers, Merchandise Presentation Managers, Food Service Managers and Foremen, persons above the rank of Sales Manager, Merchandise Presentation Manager, Food Service Manager or Foremen, office and clerical staff, employees of Eaton Travel Ltd., management trainees, Personnel Supervisor, Security Staff, Medical Services Nurse and students employed on a co-operative programme with a school, college or university ("bargaining unit #2").

5. For the purpose of clarity the Board notes the agreement of the parties that employees of the respondent headquartered or working out of other locations who work in 3003 Danforth Avenue, Metropolitan Toronto, are not within bargaining unit #1 or bargaining unit #2.

6. The Board is satisfied on the basis of all the material before it that more than fifty-five per cent of the employees of the respondent in each of bargaining units #1 and #2 at the time the application was made were members of the applicant on April 26, 1984, the terminal date fixed for this application and the date which the Board determines under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

7. Certificates will issue to the applicant in respect of bargaining units #1 and #2.

2. By the following letter dated May 11, 1984, F. G. Hamilton of counsel for the respondent requested the Board to review and reconsider that decision:

It has come to our attention during other Labour Relations Board proceedings today, that the name of Rick Watson, Senior Displayperson, was not on the list of employees filed as Schedule "A" setting out the names of employees in the proposed full-time bargaining unit. It was confirmed today that Mr. Watson was understood by the Applicant and the Labour Relations Board to be included since both in the clarity note to the decision, which we have not yet seen, and in the records of the Labour Relations Board Officer, there is no reference to Mr. Watson's exclusion. In such circumstances, Mr. Watson's name should be added to Schedule "A" and the Union membership evidence reassessed. It would appear that the Union has less than 55 percent of eligible employees and that a vote should be directed to ascertain the wishes of employees. We respectfully ask the Board to reconsider and vary its decision in this matter.

Alternatively, it has come to the attention of the Respondent employer that at least one or more of its employees who notified the Board of his or her instructions to the Union of withdrawal from membership, was not notified by the Board of any requirement of attendance at the Labour Relations Board Hearing on Friday, May 4th. We understand the employees' position

in this regard has been communicated to the Board and ask for a copy of same and the Board's reply.

The Respondent employer was informed at the meeting conducted by the Officer that the status of one membership card was critical to the membership evidence of the Union and the decision of the Board since the withdrawal from membership reduced the Union percentage to less than 55 percent in the full-time bargaining unit and would have required that a vote be conducted.

We have been instructed to make the following submissions to the Board for its review and reconsideration of its decision:

If the Board did not intend to give effect to such withdrawals from membership unless such persons attended the Hearing, the Board was, in our view, obliged to advise employees to this effect. By failing to do so, the Board offended the principles of natural justice which have been recognized by the Board and the Courts in interpreting the statute. [A passage quoted from pages 468 and 469 of the Divisional Court judgment in *Re Fisher et al, and Hotels, Clubs, Restaurants, Tavern Employees' Union, Local 261 et al.* (1980), 28 O.R. (2d) 462, has been omitted.]

Consistent with the principles of this and other precedents, the employees who notified the Board of their withdrawals from the Union were entitled to reach the understanding that nothing more was required of them regarding the withdrawals. The "Notice to Employees" (Form 6) refers to the steps to be followed by "any employee. . .desiring to make representations and that he or she may attend and be heard." However, the employees' withdrawals from membership would not be understood to fall within the Board Notice which refers to persons desiring to make representations. From the content of the enclosure, that was not the employees' intent. It would appear clear that they had already instructed the Union that their application for membership cards be withdrawn and they were not "desiring to make representations" to the Board.

[A further passage quoted from the *Fisher* case has also been omitted.]

Separate and apart from the addition of one employee to Schedule "A", referred to above and the entitlement to a vote on that ground alone, the record of the proceeding shows that the Application for Certification of a full-time employees unit was granted on the basis of there being one card in excess of the requisite 55 percent under section 7 of the Labour Relations Act. The Board apparently failed to take into account withdrawals from membership. All that appears to be contemplated by the Union's own constitution even in the case of a person fully accepted into membership is written notice of withdrawal (Article VIII, Section 12) provided there are no arrears of dues. This Union has already publicly waived any monetary payments from members prior to a collective agreement being signed.

Therefore, the Respondent respectfully submits that the Board should

reconsider its decision, revoke any order certifying the Applicant Union and, to remedy the grave injustice done to such employees, direct that a secret ballot vote be conducted to determine the true wishes of all employees in the bargaining unit.

All of which is respectfully submitted.

3. James K. A. Hayes of counsel for the applicant responded as follows to those submissions, in a letter dated May 17, 1984:

We are now retained in this matter by the applicant trade union.

We refer to Mr. Hamilton's letter dated May 11th, 1984, which the union received on May 16th, 1984. There are two objections raised by the employer to which the union replies as follows:

1. Mr. R. Watson

It need hardly be stated that, if Mr. Watson's name did not appear on Schedule "A" this was so because the employer failed to list him. To say the least it is utterly inappropriate for the employer to rely upon its own failure and ask for reconsideration after the "count" in this case had been announced, a formal hearing waived, and when the certificate was about to be released.

On frequent occasions in the past the Board has refused to consider an alteration of position by a party after the "count" has [been] announced, in order to provide some finality to proceedings and to prevent obvious attempts by either party to gerrymander. We refer you to *Santa Maria Foods* [1981] O.L.R.B. Rep. November 1618 and cases cited therein.

In any event, we are advised that the question of Mr. Watson was raised at the meeting with the Labour Relations Officer. I am instructed that Mr. Dunsmore, counsel for the employer on that occasion, referred to Mr. Watson as performing the functions of a "display manager". While there was no real discussion about this matter, the union consented to the exclusion on the basis that Section 1(3)(b) of the Act was applicable. That remains the understanding of the union.

For both of the reasons outlined above therefore, we would submit that there is no basis for re-opening this matter.

2. Statements of Desire

We have not been informed that any employee has complained that he or she has been aggrieved in any way or denied any common law or statutory rights in the processing of the instant application for certification by the Board. It is the position of the trade union that this *jus tertii* insofar as it relates to an alleged denial of natural justice, cannot be maintained by the

employer. See *Transair* (1976) 67 D.L.R. (3d) 421 (S.C.C.) at p. 438; *Alderbrook Industries*, [1981] O.L.R.B. Rep. October 1331.

In any event it is quite clear that the Board in this case has acted in a manner entirely consistent with its practice which has been established for many years. We can do no better than to refer the Board to its decision in *DI-AL Construction Ltd.* [1982] OLRB Rep. December 1822 at p. 1826 ff. . . . [The passage quoted from that case has been omitted.]

It is noteworthy that the decisions of the Board in *Baltimore Aircoil*, *supra* and *DI-AL Construction*, *supra* followed the decision of the Divisional Court in *Re Fisher* relied upon the employer.

It is our submission that this established practice of the Board is entirely consistent with the rules of natural justice. It is difficult to see how the instructions contained in paragraphs 6 and 7 of Form 6 could be more clear. [The quotation of those two paragraphs has been omitted.]

The simple fact is that no persons appeared at the scheduled hearing of this application to support the documents filed before the terminal date despite the express admonitions and warnings contained in the posted Form 6.

We note that hundreds of persons every year do appear before the Board to give evidence and make representations with respect to statements of desire. In this case there is not even an allegation before the Board made by persons purportedly affected that they had not been given adequate notice.

For all of the foregoing reasons we respectfully submit that the request for reconsideration be denied.

4. By letter dated May 30, 1984, Mr. Hamilton replied to those submissions as follows:

Receipt is acknowledged of your letter of May 23rd enclosing a letter from the solicitors for the Applicant in this matter.

As set out in our letter to the Board dated May 11th, during a meeting conducted by Labour Board Officer C. Wheatley, on that day in certification proceedings involving the same parties regarding the Respondent's store at 2300 Yonge Street (Board File No. 0235-84-R), the status of Janice Rigbey, Senior Displayperson was raised. Reference was made to this proceeding involving the Shoppers' World Store conducted by Labour Board Officer A. Vigar on May 4th. Mr. Buchanan, the Applicant's representative denied having ever agreed to the exclusion from the bargaining unit of Rick Watson, Senior Displayperson. As a result, we requested Mr. Wheatley to review the Board record in this proceeding. After having made such a review, Mr. Wheatley advised that there is no reference to any agreement to exclude Mr. Watson from the bargaining unit nor is there any such reference to exclusion in the clarity note.

Union counsel indicated in his letter to the Board that the Union "consented" to the exclusion although "there was no real discussion about his matter". Such representation is in contradiction to the statement of Mr. Buchanan made on May 11th that Union had not agreed to Mr. Watson's exclusion.

The Board decision involving *Santa Maria Foods* concerned an alteration of a position taken regarding a bargaining unit description. Of far greater import to the facts at hand is the Board decision concerning *BASF Canada Limited Inc.*, (Board File No. 0957-81-R) dated September 18, 1981, a copy of which is enclosed. This case concerned the addition of names of employees left off the employees' list. Consistent with that decision, the Respondent does not seek to amend the bargaining unit description agreed to but, rather, to ensure that a proper determination be made of the number of employees within the bargaining unit.

Further, the previous Board decision referred to events at Hearings before the Board, rather than a pre-hearing Board Officer procedure which is less formal and structured. In these circumstances, whether through misunderstanding or misadventance between the parties, the record does not, we are informed, set out an agreement to exclude Mr. Watson. Senior Display persons have in previous Board proceedings at other stores been included in the bargaining units. We submit, therefore, that Mr. Watson's name should be added to the schedule of employees and the Union's membership evidence be reassessed.

In connection with the second item raised by the Applicant as to a complaint by an employee, it continues to be our understanding that the employee's position in this regard has been communicated to the Board and we renew our request for a copy thereof and of the Board's reply.

In connection with the reference to the contents of Form 6 and the need for clear advice and information to employees, we rely upon our previous reference to the principles of natural justice set out in the Divisional Court decision in *re Fisher et al, and Hotels, Clubs, Restaurants, Tavern Employees' Union, Local 261 et al.*, 28 Ontario Reports, (2d) 462.

The Respondent, therefore, asks for a reconsideration by the Board of its decision and asks that there be a direction of a secret ballot vote to determine the true wishes of the employees in the bargaining unit.

5. A number of copies of the Board's (Form 6) Notice to Employees of Application for Certification and of Hearing (the "green sheet") were posted by the respondent at its premises affected by this application, in accordance with the requirements of section 77 of the Board's Rules of Procedure. That form, which is prescribed by Regulation 546 under the *Labour Relations Act*, notified the respondent's employees of the following information:

1. TAKE NOTICE that the applicant, on April 13, 1984, made an application to the Ontario Labour Relations Board for certification as bargaining agent of employees of T. Eaton Company Limited in the following bargain-

ing unit claimed by the applicant to be appropriate: "All employees of the respondent at its retail store at 3003 Danforth Avenue, Toronto, save and except sales managers, merchandise presentation managers, food services managers, foremen, persons above the rank of sales manager, merchandise presentation manager, food services manager and foremen, office and clerical staff, employees at Eaton Travel Ltd., management trainees, personnel supervisors, security staff and medical services nurse.

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3. The terminal date fixed for this application as directed by the Board is the 26th day of April, 1984.

4. Any employee or group of employees affected by the application and desiring to make representations to the Board in opposition to this application must send to the Board a statement in writing of such desire, which shall,

- (a) contain the return mailing address of the employee or representative of a group of employees;
- (b) contain the name of the employer concerned; and
- (c) be signed by the employee or each member of a group of employees.

5. The statement of desire must be,

- (a) received by the Board not later than the terminal date shown in paragraph 3; or
- (b) if it is mailed by *registered mail*, addressed to the Board at its office, 400 University Ave., Toronto, Ontario, M7A 1V4, mailed *not later* than the terminal date shown in paragraph 3.

6. *A statement of desire that does not comply with paragraphs 4 and 5 will not be accepted by the Board.*

7. Any employee, or group of employees, who has informed the Board *in writing* of his or their desire in accordance with paragraphs 4 and 5 may attend and be heard at the hearing in person or by a representative. Any employee or representative who appears at the hearing will be required to testify or produce a witness or witnesses who will be able to testify from his or their personal knowledge and observation, as to (a) the circumstances concerning the origination of the material filed, and (b) the manner in which each of the signatures was obtained.

THE BOARD MAY DISPOSE OF THE APPLICATION WITHOUT FURTHER NOTICE AND WITHOUT CONSIDERING THE STATEMENT OF DESIRE OF ANY PERSON WHO FAILS TO ATTEND.*

8. No oral evidence of membership in a trade union, or of objection by employees to certification of the applicant will be accepted by the Board except to identify and substantiate such written evidence.

9. AND FURTHER TAKE NOTICE that the hearing of the application by the Board will take place at the Board Room, 400 University Ave., Toronto, Ontario, on Friday the 4th day of May 1984, at 9:30 o'clock in the forenoon. EDT.

10. THE PURPOSE OF THE HEARING is to hear the evidence and representations of the parties with respect to all matters arising out of and incidental to, the application referred to in paragraph 1.

11. If you do not attend at the hearing, the Board may proceed in your absence and you will not be entitled to any further notice in the proceedings.

DATED this 15th day of April, 1984.

D.K. Aynsley
Registrar
Ontario Labour Relations Board

NOTE: Any communication with respect to this application should be addressed to:

The Registrar,
Ontario Labour Relations Board,
400 University Ave.
Toronto, Ontario
M7A 1V4

**EXPLANATORY NOTE: Where employees fail to attend in person or by a representative or to testify or produce witnesses to testify as provided in paragraph 7 above, the Board normally does not accept the statement of desire as casting doubt on the evidence of membership filed by the applicant.*

[The underlined portions of the notice appear in bold faced type on the Board's printed Form 6.]

6. The information concerning statements of desire that is contained in the "green sheet" serves to notify employees of the requirements of section 73 of the Board's Rules of Procedure, which provides as follows:

73. (1) Evidence of membership in a trade union or of objection by employees to certification of a trade union or of signification by employees that they no longer wish to be represented by a trade union shall not be accepted by the Board on an application for certification or for a declaration terminating bargaining rights unless the evidence is in writing, signed by the employee or each member of a group of employees, as the case may be, and,

(a) is accompanied by,

(i) the return mailing address of the person who files the evidence, objection or signification, and

(ii) the name of the employer; and

(b) is filed not later than the terminal date for the application.

(2) No oral evidence of membership in a trade union or of objection by employees to certification of a trade union or of signification by employees that they no longer wish to be represented by a trade union shall be accepted by the Board except to identify and substantiate the written evidence referred to in subsection (1).

(3) Any employee or group of employees affected by an application for certification or by a declaration of termination of bargaining rights and desiring to make representations to the Board in opposition to the application may file a statement in writing of such desire in the form prescribed by subsection (1) not later than the terminal date for the application, but this subsection does not apply where the Board grants a request that a pre-hearing representation vote be taken.

(4) An employee or group of employees who has filed a statement of desire in the form and manner required by this section may appear and be heard at the hearing or, in the case of an application to which sections 87 and 99 apply, at any hearing directed by the Board, in person or by a representative.

(5) The Board may dispose of the application without considering the statement of desire of any employee who fails to appear in person or by a representative and adduce evidence that includes testimony in the personal knowledge and observation of the witness as to,

(a) the circumstances concerning the origination of the statement of desire; and

(b) the manner in which each signature on the statement of desire was obtained.

7. Two persons purporting to be employees of the respondent availed themselves of the opportunity provided by the "green sheet" by sending to the Board's Registrar duplicate originals of letters apparently sent to an official of the applicant trade union. One of those letters reads as follows:

T. Eaton Co. Ltd.
3003 Danforth Ave.
Toronto, Ont.

Dear [named union official]:

I have decided that I no longer wish to be a member of Retail Wholesale & Department Store Union Local 414 AFL-CIO-CLC.

Therefore this letter is to instruct you to remove my signed union card from your files.

Yours sincerely,

[signature of employee]

c.c. Ministry of Labour

The wording of the other letter is identical in all material respects. That the employees in question wished to have their letters treated as statements of desire of the type contemplated by the "green sheet" is evident from the fact that they were mailed to the Board's Registrar by registered mail on April 26, 1984, the terminal date specified in that notice.

8. The Registrar, on behalf of the Board, acknowledged receipt of those letters by writing to each of the two employees as follows:

Receipt is acknowledged of your handwritten statement of desire dated April 25, 1984, signed by yourself a person purporting to be an employee of the respondent in the above matter.

Any doubt which the employees may have had concerning whether the Board would treat their letters as statements of desire of the type contemplated by the Board's "green sheet" would clearly have been eliminated by the wording of the Registrar's letter to each of them.

9. As indicated in paragraph 2 of the Board's decision of May 4, 1984 (as quoted above), no one appeared on behalf of either of the objectors at the time set for the commencement of the hearing of this matter (i.e., 9:30 a.m. on Friday May 4, 1984, as indicated in paragraph 9 of the "green sheet") or within one half-hour thereafter. Accordingly, the Board, pursuant to section 73(5) of its Rules of Procedure, disposed of this application without considering those statements of desire, and proceeded to issue the decision quoted above.

10. On May 10, 1984, one of the two aforementioned employees sent the following letter to the Registrar by registered mail:

Dear Mr. Aynsley:

On April 26th 1984 I sent you a copy of a registered letter that I sent to Local 414 of the Retail, Wholesale and Department Store Union AFL, CIO, CLC telling them that I was resigning from their union.

Local 414 — Shoppers World has now been certified and since I have not heard from them or you, I would like confirmation that my name was not on the list of 18 (eighteen) full-time staff submitted by the union.

That letter was referred to the Board's Senior Solicitor for reply. On May 15, 1984 he wrote to the employee as follows:

Your letter of May 9th, 1984, addressed to the Registrar of the Ontario Labour Relations Board has been referred to my office for reply.

Your letter indicates that you had sent the Board a copy of a letter advising the union that you were resigning from union membership. It also states that you did not receive any reply from the Board or from the union and asks for confirmation that your name "was not on the list of 18 (eighteen) full time staff submitted by the union."

Your letter of April 26th, addressed to [the aforementioned union official] was sent to the Ontario Labour Relations Board's Registrar by registered mail. The Board acknowledged receipt of your letter and addressed it to the return address shown on your April 26th, 1984 letter. For your information, I am enclosing a photocopy of your letter to the Board and the Board's response to it.

I am not in a position to confirm that your name was not on the membership evidence submitted by the union and relied upon by it to establish entitlement to certification. The union was entitled to rely upon the proper documentary membership evidence it had submitted in accordance with the Board's Rules of Procedure. Since there were no employees present at the scheduled Board hearing who objected to the use of any of the membership documents that had been signed by employees and filed with the Board, the Board did not disregard such membership documents.

To this end, I direct your attention to paragraphs 7 and 11 and the explanatory note on Form 6, Notice to Employees to Application for Certification which was posted at your employer's premises. I have enclosed a copy of the Form 6 which was posted for your information.

11. On May 28, 1984, the employee in question, who had received from the Registrar a copy of Mr. Hamilton's letter of May 11, 1984, wrote to the Registrar as follows:

I'm writing in response to your letter of May 16, 1984.

This is to confirm that I indeed was not aware of the need for my attendance at the hearing on May 4, 1984.

At the time I wrote the letter requesting my resignation from Union Membership (Retail, Wholesale and Department Store Union — AFL-CIO-CLC), I was under the impression that the letter was all that was required to delete my name from the list of employees signed for Union Membership.

If you require any further information, please do not hesitate to contact me.

12. Section 1(1)(1) of the Act defines "member" as follows:

In this Act,

• • •

“member”, when used with reference to a trade union, includes a person who,

(i) has applied for membership in the trade union, and

(ii) has paid to the trade union on his own behalf an amount of at least \$1 in respect of initiation fees or monthly dues of the trade union,

and “membership” has a corresponding meaning. . . .

Neither the provisions of the Act nor the Regulations made pursuant to it provide for or contemplate resignations from membership. Provision is made solely for written objection to certification of a trade union (that is, a “statement of desire”) to be filed with the Board in the manner specified in section 73 of the Board’s Rules of Procedure, as reflected in the “green sheet”. As noted above, section 73(5) specifically empowers the Board to dispose of a certification application without considering the statement of desire of an employee who fails to appear (in person or by a representative) and adduce evidence of the type specified in that subsection. The sound labour relations policy considerations which underlie this aspect of the Act and Regulations, and the Board’s practice in administering it, are described in the following passage from *Baltimore Aircoil Interamerican Corporation*, [1982] OLRB Rep. Oct. 1387:

36. We are satisfied, having regard to the initial evidence of membership filed by the applicant, that more than 55% of the employees in the bargaining unit were members of the applicant trade union as of October 23rd, 1980, the date set by the Board pursuant to section 103(2)(j) for determining evidence of membership in a trade union. However, even where the Board is satisfied that more than 55% of the employees in the bargaining unit are members of an applicant trade union the Board may direct that a representation vote be taken pursuant to section 7(2). It is in the exercise of this discretion that the Board considers “evidence of objection by employees to certification of a trade union or of signification by employees that they no longer wish to be represented by a trade union”, filed with the Board in compliance with Rule 73 of the Board’s Rules of Procedure. Stated another way, evidence of objection by employees to certification or of signification by employees that they no longer wish to be represented by a trade union is not, having regard to the scheme of the Act, evidence relating to membership in a trade union for the purposes of an application for certification and for this reason a statement of desire, no matter what the actual wording, does not cancel out or revoke membership evidence submitted by an applicant trade union in the form prescribed by section 1(1)(1) of the *Labour Relations Act*. See *Caldwell Linen Mills Limited*, [1967] OLRB Rep. March 948 at paragraph 10; *Diebold Company of Canada Limited*, [1976] OLRB Rep. May 237 at paragraph 10; and *Re Royal Canadian Yacht Club and Hotel, Restaurant and Cafeteria Employees’ Union, Local 75 et al.*, (1981), 119 D.L.R. (3d) 554 at 558. Rather, relevant “overlapping” evidence of objection by employees to certification of a trade union or of signification by employees that they no longer wish to be represented by

a trade union, filed not later than the terminal date for the application, and where accepted by the Board as a voluntary expression of the wishes of the employee signatories, will generally cast a doubt on the evidence of membership filed by an applicant (to use the words of the explanatory note found in Form 6) such as to cause the Board to exercise its discretion under section 7(2) and direct the taking of a representation vote. It would be somewhat anomalous if evidence of membership, which must withstand the requirements laid down in the Act together with its related rules and forms, could be "revoked" by a much less formal and essentially unregulated course of conduct which usually follows on the heels of an employee having joined a trade union. By making a representation vote the maximum effect of an opposing petition the legislation both accommodates the resiling nature of petition evidence and recognizes that trade union organizing campaigns often require considerable investment of time and monies. Once an employee has signed a membership application form and submitted to the cautionary test of the payment of \$1.00, a trade union is entitled to rely on that commitment for the purposes of an application for certification to the extent that it is assured its application will not be dismissed on the basis of insufficient threshold membership support (i.e. 45 percent) by the mere filing of a "second thoughts" prior to the terminal date. If this was not the approach taken, a trade union would never know when to cease organizing. It is this relationship between membership and petition evidence which constitutes part of the policy behind permitting this board to direct a representation vote even when the trade union files membership evidence on behalf of more than 55 per cent in the bargaining unit. It is also the reason why the statute distinguishes between an application date and a terminal date.

13. There was (and still is) nothing in the circumstances of the present case which would make it appropriate to depart from that approach. Accordingly, having regard to the pertinent provisions of the Act and Regulations, the applicable Board jurisprudence and the labour relations policy considerations which underlie it, the Board treated the aforementioned letters as statements of desire in opposition to the applicant's certification application. As noted above, it is apparent that the employees wished to have them so treated in that they sent them to the Board's Registrar by registered mail on the terminal date, in accordance with the directions specified on the "green sheet". Moreover, as further noted above, the Registrar, in acknowledging receipt of those letters, specifically referred to them as statements of desire. The "green sheet" makes it quite clear to employees who send such statements to the Board that if they fail to attend the hearing, or to testify or produce the necessary witnesses, "the Board normally does not accept the statement of desire as casting doubt on the evidence of membership filed by the applicant". This information is highlighted by the use of bold faced type and block letters (in paragraph 7) and the inclusion of an "EXPLANATORY NOTE" which is also printed in bold faced type for emphasis. By failing to appear in person or by a representative, and adduce evidence as to the circumstances concerning the origination and signing of their letters, the employees created a situation in which it was quite appropriate for the Board to dispose of the application without considering their statements of desire. Moreover, there is nothing in the submissions subsequently sent to the Board by the employee in question, or by respondent's counsel, which persuades us to reconsider, vary, or revoke that decision. In this regard, we find no merit in counsel for the respondent's submission that the Board has offended the principles of natural justice. The *Fisher* case (*supra*), upon which counsel for the respondent relies heavily

in his written submissions, is clearly distinguishable from the present case. In that judgment, the Ontario Divisional Court quashed a certification decision by the Board in which the Board declined, at the hearing of the matter, to give any weight to a “petition” which read: “The undersigned people are petitioning the Hotels, Clubs, Restaurant, Taverns Employees Union Local 261”. The Board also declined to permit any evidence to be adduced concerning the meaning of those ambiguous words, despite the fact that the objectors attended at the hearing and sought leave to adduce such evidence. By way of contrast, neither of the employees who mailed the aforementioned statements of desire to the Board in the present case attended at the location and time set for the commencement of the hearing of this application (or within one half-hour thereafter). Accordingly, as indicated in paragraph 1 of the Board’s aforementioned decision of May 4, 1984 in this matter, representatives of the applicant and the respondent met with a Board officer, reached agreement on all matters in dispute between them, and agreed to waive their right to a formal hearing in the matter. Under the circumstances we are not prepared to permit an objecting employee, who failed to comply with the instructions set forth on the green sheet, to belatedly upset that waiver and the Board’s certification of the applicant.

14. We are also of the view that the omission of Rick Watson from Schedule “A” of the list of employees does not constitute a proper ground for reconsidering or revoking our decision of May 4th. The Board’s practice concerning amendment of employers’ lists of employees is also well established in the Board’s jurisprudence and well known to the labour relations community. See, for example, *Santa Maria Foods*, [1981] OLRB Rep. Nov. 1618:

7. The Board’s Rules and the certification hearing are ordered precisely to avoid the mischief of either party gerrymandering the employee list or the structure of the bargaining unit in such a way as to avoid or favour certification, as the case may be. Pursuant to Form 3 [now Form 4] of the Board’s Regulations an employer is required to provide to the Board, not later than the terminal date, complete lists of employees in the bargaining unit proposed by the union on the date of application. The late filing of lists or the amendment of lists filed can be only by leave of the Board pursuant to its discretion under section 58 [now section 83] of the Rules of Procedure.

8. At the outset of the hearing the Board will generally allow the employer to amend the lists filed to reflect any new information not previously available or to correct any error. During the hearing the Board does not announce the count of employees or any union membership until the description of the bargaining unit is settled. Similarly it does not announce the membership count until the count of employees in the unit is determined, subject, of course, to such outstanding challenges to the list as may have been made to that point in the hearing. These are rules well known to the parties and articulated in the Board’s jurisprudence. (See, *Gwell Investments Ltd.*, [1971] OLRB Rep. Oct. 675; *The Corporation of the Township of Kingston*, [1975] OLRB Rep. Apr. 370; *Inter City Food Services Inc.*, [1976] OLRB Rep. July 388; *Greater Windsor Investments Ltd. Windsor Nursing Home*, [1976] OLRB Rep. Sept. 515. Without these general rules certification hearings would be endless meanderings without map or compass, each turn in the journey being dictated by changing perceptions of the parties as to what best serves their own interests. That is why, absent extraordinary circumstances, the Board does not entertain

submissions on the structure of bargaining unit or list of employees in the unit after the point in the hearing when the count has been given.

15. Similar considerations apply to certification applications such as the present one in which the parties meet with a Board Officer, reach agreement on all matters in dispute between them, and agree to waive their right to a formal hearing in the matter. Although the proceedings before the Board Officer are conducted somewhat more informally than a Board hearing, the approach enunciated in *Santa Maria Foods* remains applicable. A party is no more entitled to gerrymander the list of employees after the membership count has been announced by a Board Officer than after the Board has done so in a formal hearing. Knowing that the Board will rely upon the information provided on the four schedules that constitute the employer's list (subject to any challenges which may be raised by another party), an employer must prepare those schedules with great care. The need for accuracy is emphasized by paragraph 7 of the Form 4 Notice (to the respondent) of Application for Certification and of Hearing, which directs the respondent as follows:

7. You shall verify the list of employees by adding thereto the following the statement:

This list has been prepared by me or under my instruction and I hereby confirm the accuracy thereof."

.....
Signature

Pursuant to that direction, that statement was typed on each of the four schedules filed with the Board in the instant case, and signed by "R. Hubert" on behalf of the respondent. At the time when Mr. Watson's name arose in the meeting with the Board Officer, the respondent's representatives knew or should have known that his name was not on the list of employees filed with the Board by the respondent. They also knew or should have known that a person classified as a "Senior Displayperson" who was referred to by respondent's counsel (Mr. Dunsmore) in that meeting as performing the functions of a "Display Manager" would be presumed to be excluded from the bargaining units as a person "above the rank of Sales Manager, Merchandise Presentation Manager, Food Service Manager or Foreman", unless his name was added to the list. That no such addition was made would or should have been obvious to the respondent's representatives from the fact that the denominator of the count (that is, the number of union members in the bargaining unit divided by the number of employees in the bargaining unit for purposes of the count) in neither bargaining unit #1 nor bargaining unit #2 reflected the addition of a further employee above and beyond the number of employees on the list as originally filed by the respondent, less the employees not included for purposes of the count by virtue of the Board's "30-30" rule (as described in *Brewers Nursing Home*, [1981] OLRB Rep. July 852). Thus, any ambiguity in the minds of the respondent's representatives concerning Mr. Watson's exclusion from the bargaining units would or should have been eliminated by the Officer's announcement of the count for each unit.

16. We have reviewed the Board's unreported decision dated September 18, 1981 in *BASF Canada Inc.* (File No. 0957-81-R) referred to in Mr. Hamilton's letter of May 30, 1984, and have concluded that it does not support the requested amendment to the respondent's list in the present circumstances. In that case the parties reached agreement on the description of the bargaining unit and the count was announced, "leaving the applicant just shy of the level

of support required for certification without a vote". The applicant trade union then challenged one of the eight laboratory technologists on the employer's list on the basis of community of interest. That challenge affected the count in such a way that the applicant would have been in a certifiable position if the challenge succeeded. By decision dated August 18, 1981, the Board appointed a Board Officer to enquire into and report to the Board on that issue. Pursuant to that appointment, the Officer set a meeting with the parties for September 21, 1981. Prior to that meeting, the employer wrote to the Board to indicate that, by oversight, it had omitted from the list of employees the names of two additional laboratory technologists. In permitting further enquiry into the list of employees by expanding the scope of the Board Officer's appointment, the Board wrote, in part, as follows:

2. . . . The applicant objects to any amendment to the employee list at this late date, relying in particular on *Greater Windsor Investments Limited* [1963] OLRB Rep. Sept. 515 as setting out the Board's practice in these matters. That case, however, dealt not with amendments to the list of employees, but to the description of the bargaining unit. The Board stated:

"4. In an application for certification the applicant trade union and the respondent employer are each invited in their initial filings with the Board to set out the description of the bargaining unit which it claims to be appropriate for collective bargaining, (see Form 1, Application for Certification and Form 9: Reply to Application for Certification.) The parties, however, are not held to their initial proposals and as a general rule they are permitted to amend their proposals up to and even during the hearing (see *Hashman Construction — Division of Tristar Western Ltd.* [1973] OLRB Rep. Dec. 630.) However, once the Board at the hearing has disclosed the number of persons in the bargaining unit as indicated on the schedules filed by the respondent, as well as the membership position of the trade union, the Board's well established practice is not to allow one party to unilaterally alter its proposal for the bargaining unit (see *The Corporation of the Township of Kingston* [1975] OLRB Rep. April 370). This is done in part to ensure that a party cannot modify its proposed bargaining unit solely to take advantage of the union's membership position (see *Gwell Investments Ltd.* [1971] OLRB Rep. Oct. 675.) However, a second purpose is to ensure that the certification process is not allowed to drag on indefinitely. The Board's procedure is such as to ensure that at the hearing the parties will either reach agreement as to the appropriate bargaining unit (which agreement the Board will usually, though not necessarily adopt) or at least clearly delineate the differences between them."

It is because of the recognized distinction between the description of the bargaining unit and the list of employees purportedly employed in the unit on the date of the application that a trade union is permitted to challenge the employer's list after the count is announced, as the applicant did here.

3. It is, however, the *employer* who prepares the list and has access to the employment records on which it is based, and the two parties are hardly in the same position *vis-a-vis* that list. While the number of employees employed in the bargaining unit on the date of the application is a question

of fact which the Board must ascertain, the Board retains a discretion over its procedure to ensure that no abuse of process, or indefinite prolongation of an application, takes place. Where an omission on the part of the respondent in submitting its list of employees has resulted in either a clear tactical advantage to the respondent, or clear delay that could have been avoided, the principles of estoppel may well operate to prevent the respondent from altering its own position before the Board.

4. The Board is not satisfied in the present case that sufficient grounds for estoppel exist so as to prevent further inquiry into the list of employees. In reaching this conclusion, the Board takes into account the fact that the meeting with the officer over Mr. Pan has not yet taken place. The Board accordingly directs the officer, Mr. Wheatley, to also inquire by record-check into the list of employees, as the respondent seeks to amend it, and, if necessary, to any challenge forthcoming from the applicant, on the basis of community of interest, to the additional persons the respondent is seeking to include. The Board further directs the respondent to have its employment records for the date of June 23, 1981 immediately available and in such a state as will permit the officer to inquire into this matter without delay.

17. Having carefully considered the matter, we have concluded that the present situation does not fall within the relatively narrow scope of the *BASF* case, but rather within the more generally applicable parameters of *Santa Maria Foods, supra*. Unlike the *BASF* case in which the union, at the time the additions to the list were requested by the employer, had not established any entitlement to certification without a vote, the respondent did not seek to amend its list in the instant case until after the Board had issued two certificates to the applicant on the basis of the material filed with it by the applicant and the respondent, including the aforementioned list of employees and the aforementioned waiver of hearing. Permitting the respondent to amend its list in this belated fashion would result in clear delay and prejudice to the applicant, which could easily have been avoided by due diligence on the part of the respondent. In regard to the respondent's belated attempt to have Mr. Watson added to the list and also in regard to the aforementioned objecting employee's attempt to upset the certification of the applicant, we note that the need for expedition in the processing of labour relations matters in general, and certification matters in particular, and the prejudice which can otherwise result to an applicant union, have long been recognized by this Board and by the Courts. See, for example, *Nick Masney Hotels Ltd.* (1970), 70 CLLC ¶ 14,020 (Ont. C.A.), at page 101 (per Laskin J.A.):

... The Ontario Labour Relations Board deals in certification matters with fluid situations which cannot be judged by the more leisurely standards that operate in the prosecution of a claim for damages for a tort or for a breach of contract where the situation is fairly well frozen when the tort or the breach of contract has occurred. Expedition is important to a union, to employees and to an employer since the certification is merely the first step in an often laborious collective bargaining process. . . .

See also *Canada Dry Bottling Company (Kingston) Ltd.*, [1978] OLRB Rep. Nov. 976, at paragraph 8, in which the Board wrote:

... In certification matters it is particularly important that all parties be

prepared to prove their case on the date fixed for the hearing. Delays can often cause serious and irreparable prejudice to the applicant. As Estey, C.J.O. (as he then was) noted in *Journal Publishing Co. of Ottawa Ltd. et al v. Ottawa Newspaper Guild Local 205, OLRB et al* (unreported) March 31, 1977 (C.A.) "labour relations delayed are labour relations defeated and denied". (See also *Komo Construction Incorporated v. Quebec Labour Relations Board et al*, 68 CLLC ¶14,108 (SCC)).

18. For the foregoing reasons, the Board, in the exercise of its discretion under section 106(1) of the *Labour Relations Act*, hereby declines to reconsider, vary or revoke its decision dated May 4, 1984 in this matter.

19. The decision of Board Member W. G. Donnelly will issue at a later date.

DECISION OF BOARD MEMBER W. G. DONNELLY;

In the interest of industrial democracy I would have ordered that a secret ballot be taken in view of the uncertainty about union membership and lack of notice of hearing to those who resigned from the union.

1800-81-U;1971-81-R Mauri Ahokas et al, Complainants, v. The Canadian Union of Public Employees, Local 87, Canadian Union of Public Employees, Grace Hartman et al, Respondents; The Municipal Technicians Association of the City of Thunder Bay, Applicant, v. **The Corporation of the City of Thunder Bay**, Respondent, Canadian Union of Public Employees, Local 87, Intervener

Constitutional Law — Reconsideration — Remedies — Unfair Labour Practice — Board remedial order rejecting claim of group of employees to carve out own unit — Not breach of freedom of association — Other grounds for reconsideration denied

BEFORE: M. G. Picher, Vice-Chairman and Board Members W. F. Rutherford and J. A. Ronson.

DECISION OF THE BOARD; July 23, 1984

1. By letter dated May 31, 1984 counsel for the complainants in the section 89 complaint and applicant in the request for certification asks for reconsideration of the decision of the Board herein dated May 4, 1984 (now reported at [1984] OLRB Rep. May 759).

2. The principles which the Board generally applies in the exercise of its discretion to reconsider a decision have been reviewed in a number of prior Board decisions. Generally reconsideration will be limited to cases where a party seeks to advance new evidence or representations not available to it at the time of the hearing by the exercise of due diligence. In the interests of finality, the Board normally guards against allowing reconsideration to be used as an appeal or reargument the same case. *Imperial Tobacco Products, (Ontario)*

Limited, [1974] OLRB Rep. Sept. 609; *York University*, [1976] OLRB Rep. Apr. 187; *Thomas Steel Construction Limited*, [1979] OLRB Rep. May 440; *Rehau Plastiks of Canada Ltd.*, [1980] OLRB Rep. 774; *H. Kerr Construction Limited*, [1980] OLRB Rep. Aug. 1204; *K Mart Canada Ltd. (Peterborough)*, [1981] OLRB Rep. Feb. 185; *Auto Jobbers Warehouse Ltd.*, [1982] OLRB Rep. May 649; *The Corporation of the City of Ottawa*, [1982] OLRB Rep. Nov. 1698.

3. The submission of counsel for the complainants is lengthy and reiterates a number of arguments which were advanced at the hearing. One argument made is that:

“The Board failed to give consideration to the factor of the wish for self-determination on the part of the group of employees which is in violation of the Canadian Constitution which guarantees freedom of association”.

The Canadian Constitution, and in particular the *Charter of Rights and Freedoms*, received only the most cursory and indirect mention in the oral submissions of counsel for the complainants at the hearing. The Board was given no argument in substance respecting the complainant's constitutional rights. Counsel made one brief and unexplained comment that to maintain the existing bargaining unit would be to disregard the freedom of association of his clients. Because of the gratuitous nature of that comment, which received no elaboration and was unsupported by any specific references to the case law, statute law or the words of the Charter of Rights itself, the Board did not consider that it merited any specific or extended analysis in its decision.

5. Lest there be any misunderstanding, however, we are prepared to comment, however briefly, on that aspect of the request for reconsideration. Freedom of association is protected by section 2(d) of the *Charter of Rights and Freedoms* which provides:

Everyone has the following fundamental freedoms:

• • •

(d) freedom of association.

The relationship between the right of freedom of association and collective bargaining rights remains to be defined by the time-honoured process of case by case analysis and development. That is how our tribunals and courts develop the construction of statutes, and nowhere is that incremental process more appropriate than in the interpretation and refinement of constitutional rights. It is therefore incumbent upon tribunals such as this Board to deal with such issues as they arise, but insofar as possible, to deal with the specific issue raised, avoiding unnecessarily broad pronouncements which could impede or obscure the long range process of constitutional development. (*Dry Bulk Formworkers Ltd.*, [1974] OLRB Rep. Sept. 629; *Windsor Airline Limousine Services Ltd.*, [1980] OLRB Rep. Feb. 272; *Third Dimension Manufacturing Limited*, [1983] OLRB Rep. Feb. 261.

6. Considerable guidance is beginning to emerge from the decisions of the courts on the *Charter of Rights and Freedoms*. It is becoming more and more apparent that the restrictions on rights which exist in a number of statutes are not viewed by the judiciary as contrary to the Charter. That has been specifically confirmed with respect to labour relations statutes, in general, and the Ontario *Labour Relations Act* in particular.

7. Labour relations laws are, by definition, devoted to the relations between employees and employees formed into associations. By the application of majoritarian principles employees are permitted to obtain, exercise and terminate bargaining rights according to the will of the majority. To ensure the viability of the collective bargaining system the Act imposes certain constraints in the exercise of collective bargaining rights. Collective agreements must be for the minimum period of time provided in the Act. The right to terminate or displace a union can be exercised only within time limits which are also established in the Act. The right to strike and lock out are also limited in time.

8. Provisions of that kind have not been found to infringe upon freedom of association. In *Re Prime and Manitoba Labour Board*, (1983) 23 A.C.W.S. (2d) 130 (Man. Q.B.) the Court concluded that the decision of the Board certifying a union did not infringe the employees' freedom of association because neither the Act nor the Board's decision forced the employees to join or refrain from joining a union. In *Re United Headwear, Optical and Allied Workers' Union of Canada, Local 3 and Biltmore/Stetson (Canada) Inc.*, (1983) 43 O.R. (2d) 243 (C.A.) the Ontario Court of Appeal was asked to declare, among other things, that the decision of this Board which in that case interpreted the Act as time-barring a further application for certification by the unsuccessful union was in violation of the freedom of association guaranteed to the employees under section 2 of the Charter. At p. 256 of its decision, in the briefest of remarks, the court dismissed that argument by stating that it saw no merit in the submission.

9. Freedom of association is not the unfettered right to enter into the ranks of a bargaining unit of one's choosing. While the Board may take the wishes of employees into account in deciding on the appropriateness of a given unit of employees for collective bargaining purposes, it must also consider other factors which are important in the establishment of a sound and viable bargaining structure. That was expressly reflected in the following comment in this Board's decision of May 4, 1984:

Of paramount concern is the possibility of severing the existing unit of office and clerical employees, or "inside employees", as they are generally known. In any application for certification it is the obligation of the Board to consider what deliniation of employees will be suited to collective bargaining as a group. While the Board has noted that it must not necessarily select the ideal bargaining unit designation, it does strive, insofar as possible, to fashion and preserve the most comprehensive unit of employees which will constitute a viable bargaining structure. The wish for self-determination on the part of a group of employees is a factor to be considered among others, but it is not the determining factor in all cases. (*McDonald's Restaurants of Canada Ltd.*, [1974] OLRB Rep. Oct. 755; *Ponderosa Steak House*, [1974] OLRB Rep. Nov. 7; *Canada Trustco Mortgage Co.*, [1977] OLRB Rep. June 330 and see also *Parnell Foods Ltd.*, [1969] OLRB Rep. Apr. 38; *Stratford General Hospital*, [1976] OLRB Rep. Sept. 459.)

10. If, as counsel for the complainants implies, the determination of bargaining units is to be determined solely by reference to the preference of a given group of employees (and in this case, in apparent disregard of the contrary wishes of a larger group of employees), the Board's jurisdiction to determine the appropriate bargaining unit would be reduced to poll-taking. That is not what the Act intends. It is axiomatic that in any disputed case some employees will disagree with the bargaining unit structure established by the Board. That is inevitable. It does not follow, however, that a Board decision rejecting the preference of a group

of employees infringes their freedom of association. Nothing in the Board's decision respecting the bargaining unit limits the freedom of association of any employees.

11. The Board has reviewed the other arguments raised in the letter of counsel from the complainants and sees in those submissions no basis to reconsider its decision. Nor do we see in the material filed anything that would, if proved, establish a *prima facie* case that the respondent union has failed or refused to implement the Board's remedial order of May 4, 1984. It appears that the union called two meetings, one in June to establish an *ad hoc* committee to prepare for bargaining and one in September, to choose the bargaining committee pursuant to future amendments of the Local's by-laws to comply with the Board's order. On the face of the material filed by counsel for the complainants both of the committees are to be structured in accordance with the Board's direction. It does not appear, nor is it alleged, that eligibility to participate on either committee has been or will be denied to any of the complainants.

12. Counsel for the complainants suggests that the Board is biased in favour of the respondent union. We refrain from making any comment upon that allegation. It would scarcely be appropriate for the Board to become the arbiter of an allegation of its own bias or bad faith. Issues of that kind are best dealt with by another forum.

13. For the foregoing reasons the request for reconsideration must be denied.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JUNE 1984

BARGAINING AGENTS CERTIFIED

No Vote Conducted

0217-83-R: Alliance Employees' Union, (Applicant) v. Taxation Component, Public Service Alliance of Canada, (Respondent).

Unit: "all employees of the respondent in Ottawa save and except elected officers, the secretary to the executive secretary, the executive secretary-treasurer and persons above the rank of executive secretary-treasurer." (4 employees in unit).

1357-83-R: Hotel Employees and Restaurant Employees Union, Local 75, (Applicant) v. The Polish Alliance Friendly Society of Canada Branch No. 19, Social Club, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Thunder Bay, Ontario, save and except supervisors, persons above the rank of supervisor and sales and office staff." (15 employees in unit).

1455-83-R: Service Employees Union, Local 183, AFL, CIO, CLC, (Applicant) v. Centre Hastings Nursing Home Limited, (Respondent).

Unit #1: "all employees of Centre Hastings Nursing homes Limited employed at its nursing home in the Village of Marmora, Ontario, save and except managers persons above the rank of manager, office staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (55 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of Centre Hastings Nursing Homes Limited regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period at its nursing home in the Village of Marmora, Ontario, save and except managers, persons above the rank of manager and office staff." (55 employees in unit). (*Having regard to the agreement of the parties*).

Unit #3: "all employees of Centre Hastings Nursing Homes Limited employed at its retirement homes in the County of Hastings, save and except managers, persons above the rank of manager, office staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (55 employees in unit). (*Having regard to the agreement of the parties*).

Unit #4: "all employees of Centre Hastings Nursing Homes Limited, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period at its retirement homes in the County of Hastings, save and except managers, persons above the rank of manager and office staff." (55 employees in unit). (*Having regard to the agreement of the parties*).

1839-83-R: The Canadian Union of Public Employees, (Applicant) v. Town of Newcastle Public Library Board, (Respondent).

Unit #1: "all employees of the respondent in the Town of Newcastle, save and except persons above the rank of branch head, administrative assistant to the chief librarian, pages, persons regularly employed

for not more than twenty-four hours per week, and students employed during the school vacation period.” (6 employees in unit). (*Clarity Note*).

Unit #2: “all employees of the respondent in the Town of Newcastle regularly employed for not more than twenty-four hours per week and students employed during the school vacation, save and except persons above the rank of branch head, administrative assistant to the chief librarian and pages.” (5 employees in unit). (*Clarity Note*).

1857-83-R: International Union of Operating Engineers, Local 793, (Applicant) v. Smiths Construction Company Arnprior Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of Smiths Construction Company Arnprior Limited engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and all construction labourers and truck drivers in the employ of Smiths Construction Company Arnprior Limited within a radius of 57 kilometers (approximately 35 miles) of the City of Sudbury Federal Building (Board area #17) and also in the Township of Bigwood, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (41 employees in unit). (*Having regard to the representations of the parties*).

2085-83-R: Ontario Nurses’ Association, (Applicant) v. Knollcrest Lodge, (Respondent).

Unit: “all registered and graduate nurses employed in a nursing capacity by Knollcrest Lodge at Milverton, Ontario, save and except the in-service co-ordinator, director of nursing and persons above the rank of director of nursing.” (8 employees in unit).

2997-83-R: The Canadian Union of Public Employees, (Applicant) v. The Corporation of the City of Brampton, (Respondent) v. Amalgamated Transit Union, Local 1573, (Intervener).

Unit: “all employees of the respondent in the City of Brampton save and except foremen and supervisors, persons above the rank of foreman and supervisor, professional engineers, property standards by-law enforcement and licensing officers and inspectors, personnel department staff, legal department staff, secretaries to the commissioners, secretary to the administrative officer, secretary to the fire chief, secretary to the Mayor, secretary to the Council, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period and persons covered by subsisting collective agreements.” (43 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

3041-83-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. Holy Rosary Parish (Thorold) Credit Union Limited, (Respondent).

Unit #1: “all employees of the respondent in Thorold, Ontario, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more more than 24 hours per week and students employed during the school vacation period.” (14 employees in unit).

Unit #2: (See: *Applications for Certification Dismissed Subsequent to a Post-Hearing Vote*).

0071-84-R: International Union of Bricklayers and Allied Craftsmen, Local 2, (Applicant) v. Camron Construction Services, (Respondent).

Unit #1: “all bricklayers, bricklayers’ apprentices, stonemasons and stonemasons’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in unit).

Unit #2: “all bricklayers, bricklayers’ apprentices, stonemasons and stonemasons’ apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within

the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in unit).

0095-84-R: Labourers’ International Union of North America, Local 183, (Applicant) v. Memme Excavation Company Limited, (Respondent).

Unit #1: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (9 employees in unit).

Unit #2: “all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (9 employees in unit).

0130-84-R: Service Employees Union, Local 210, Affiliated with Service Employees International Union, AFL, CIO, CLC, (Applicant) v. Elgin Abbey Nursing Home, (Respondent).

Unit #1: “all employees of the respondent at Chesley, Ontario, save and except registered and graduate nurses, supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (16 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Unit #2: “all employees of the respondent at Chesley, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except registered and graduate nurses, supervisors, persons above the rank of supervisor, and office and clerical staff.” (8 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

0187-84-R: Local 1316, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Huron Drywall Limited and Melrose Steel & Acoustics Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit #1: “all carpenters and carpenters’ apprentices in the employ of the respondents in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (14 employees in unit).

Unit #2: “all carpenters and carpenters’ apprentices in the employ of the respondents in the Counties of Oxford, Perth, Huron, Middlesex, Bruce, and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (14 employees in unit).

0235-84-R: Retail, Wholesale and Department Store Union, AFL, CIO, CLC, (Applicant) v. T. Eaton Company Limited, (Respondent) v. International Union of Operating Engineers, Local 796, (Intervener) v. Group of Employees, (Objectors).

Unit #1: “all employees of the respondent at its retail store at 2300 Yonge Street, Metropolitan Toronto, save and except sales managers, merchandise presentation managers, food service managers, foremen, persons above the rank of sales manager, merchandise presentation manager, food service manager or foreman, office and clerical staff, employees of Eaton Travel Ltd., management trainees, personnel supervisor, security staff, medical service nurse, persons regularly employed for not more than twenty-four (24) hours per week, students employed on a co-operative programme with a school, college or university.” (22 employees in unit).

Unit #2: “all employees regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period of the respondent at its retail store at 2300 Yonge

Street, Metropolitan Toronto, save and except sales manager, merchandise presentation managers, food service managers, foremen, persons above the rank of sales manager, merchandise presentation manager, food service manager or foreman, office and clerical staff, employees of Eaton Travel Ltd., management trainees, personnel supervisor, security staff, medical services nurse and students employed on a co-operative programme with a school, college or university.” (31 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

0292-84-R: United Food and Commercial Workers International Union, AFL-CIO-CLC, (Applicant) v. Weetabix of Canada (MFG) Limited, (Respondent).

Unit: “All employees of the Cobourg plant of the Company, save and except forepersons, persons above the rank of foreperson, office and sales staff, laboratory and quality control technicians, salaried senior maintenance technicians and employees covered by a subsisting collective agreement.” (18 employees in unit). (*Having regard to the above and the agreement of the parties*).

0299-84-R: Labourers’ International Union of North America, Local 506, (Applicant) v. Carswell & Norton Limited, (Respondent).

Unit #1: “All construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

Unit #2: “all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

0399-84-R: United Brotherhood of Carpenters and Joiners of America, Local 1988, (Applicant) v. Harper and Wellesley, (Respondent).

Unit #1: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (7 employees in unit).

Unit #2: “all carpenters and carpenters’ apprentices in the employ of the respondent in the geographic Townships of Elizabethtown, Augusta and Edwardsburg and all lands south thereof in the United Counties of Leeds and Grenville, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (7 employees in unit).

0400-84-R: Canadian Union of Public Employees, (Applicant) v. The Children’s Aid Society of Owen Sound and the County of Grey, (Respondent).

Unit: “all employees of the respondent in the County of Grey in the Province of Ontario, save and except Confidential Secretary to the Director, supervisors, persons above the rank of supervisor, and persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (15 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: (*See: Applications for Certification Dismissed - No Vote Conducted*).

0411-84-R: The Canadian Union of Public Employees, (Applicant) v. Halton Roman Catholic Separate School Board, (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent in the Regional Municipality of Halton save and except supervisors, persons above the rank of supervisor, office, clerical and technical staff.” (58 employees in unit). (*Having regard to the agreement of the parties*).

0414-84-R: Ontario Public Service Employees Union, (Applicant) v. The Metropolitan Toronto School Board, (Respondent).

Unit: "all occasional teachers employed by the respondent in the Municipality of Metropolitan Toronto, save and except persons covered by subsisting collective agreements." (85 employees in unit). (*Having regard to the agreement of the parties*).

0420-84-R: United Brotherhood of Carpenters & Joiners of America, Local Union 2679, (Applicant) v. Bauhows Custom Wood Products Ltd., (Respondent).

Unit: "all employees of the respondent employed in Metropolitan Toronto, save and except foremen, persons above that rank, office, and sales staff." (4 employees in unit).

0432-84-R: Local 1590, International Brotherhood of Electrical Workers, (Applicant) v. Viewstar Inc., (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto save and except foremen, persons above the rank of foremen, office and sales staff." (272 employees in unit).

0434-84-R: United Brotherhood of Carpenters and Joiners of America, Local 2679, (Applicant) v. Romac Industries Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the Regional Municipality of Peel, save and except foremen, persons above the rank of foreman, and office and sales staff." (27 employees in unit).

0459-84-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W. (Applicant) v. Kasle Steel of Canada Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Windsor, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff." (32 employees in unit). (*Having regard to the agreement of the applicant and the respondent*).

0461-84-R: Association of Allied Health Professionals: Ontario, (Applicant) v. Kingston, Frontenac and Lennox and Addington Health Unit, (Respondent).

Unit: "all paramedical employees of the respondent in the City of Kingston and the Counties of Frontenac, Lennox and Addington, save and except supervisors, persons above the rank of supervisor, students employed during the school vacation period and persons covered by subsisting collective agreements." (18 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

0462-84-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC, (Applicant) v. MacDonald Beverages, (Respondent).

Unit: "all employees of the respondent regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, working in and out of Sault Ste. Marie, Ontario, save and except foremen and/or sales representatives, persons above the rank of foremen and sales representative and office staff." (2 employees in unit).

0463-84-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC, (Applicant) v. MacDonald Beverages, (Respondent).

Unit: "all office and clerical employees of the respondent at Sault Ste. Marie, Ontario, save and except office manager and persons above the rank of office manager." (3 employees in unit).

0469-84-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Hammercraft Ltd., (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

0471-84-R: United Steelworkers of America, (Applicant) v. A. O Smith Enterprises Ltd., (Respondent).

Unit: "all employees of the respondent in the City of Stratford, Ontario, save and except foremen, persons above the rank of foreman, quality control inspectors, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (73 employees in unit). (*Having regard to the agreement of the parties*).

0488-84-R: Hotel Employees Restaurant Employees Union, Local 75, (Applicant) v. Domco Foodservices Limited, (Respondent).

Unit: "all employees of the respondent at Manitouwadge, Ontario, save and except supervisors, persons above the rank of supervisor, head chef, restaurant manager, office and accounting staff." (15 employees in unit). (*Having regard to the agreement of the parties*).

0495-84-R: Teamsters Local Union No. 352, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Decoustics Limited, (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except foremen, those above the rank of foremen, office, clerical, technical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (34 employees in unit). (*Having regard to the agreement of the parties*).

0515-84-R; 0516-84-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Wallaceburg IGA, (Respondent).

Unit: "all employees of the respondent at Wallaceburg, Ontario, save and except the Assistant Manager, persons above the rank of Assistant Manager and students employed during the school vacation period." (46 employees in unit). (*Having regard to the agreement of the parties*).

0531-84-R: Labourers' International Union of North America, Local 506, (Applicant) v. Urban Mechanical Contracting (1979) Ltd., (Respondent).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

0534-84-R: United Food & Commercial Workers International Union local 1105P A.F.L., C.I.O., C.L.C., (Applicant) v. Meat Connection Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the City of Waterloo, save and except foreman, persons above

the rank of foreman, office, clerical and sales staff.” (129 employees in unit). (*Having regard to the agreement of the parties*).

0541-84-R: Hotel Employees Restaurant Employees Union, Local 75, (Applicant) v. Canada Catering Co. Ltd., (Respondent).

Unit: “all employees of Canada Catering Co. Ltd. at Canada Post, 280 Progress Road, in the Regional Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and sales staff.” (4 employees in unit). (*Having regard to the agreement of the parties*).

0547-84-R: United Brotherhood of Carpenters and Joiners of America, Local Union 3189, (Applicant) v. Luke’s Carpentry Shop, A Division of Colomar Holdings Limited, (Respondent).

Unit: “all employees of the respondent in Guelph, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff.” (20 employees in unit). (*Having regard to the agreement of the parties*).

0548-84-R: Laundry and Linen Drivers and Industrial Workers Union, Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Wire World Industries Limited, (Respondent).

Unit: “all employees of the respondent at Concord, Ontario, save and except foremen, persons above the rank of foreman, office, sales and technical staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (32 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

0552-84-R: Labourers’ International Union of North America, Local 527, (Applicant) v. Dinacon Construction Ltd., (Respondent).

Unit #1: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (7 employees in unit).

Unit #2: “all construction labourers in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (7 employees in unit).

0553-84-R; 0554-84-R: London and District Service Workers’ Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., (Applicant) v. Norfolk Haldimand Regional Nursing Home, (Respondent) v. Employee, (Objector).

Unit #1: “all employees of Norfolk Haldimand Regional Nursing Home at Port Dover, Ontario, regularly employed for not more than twenty-four hours per week and students employed during the school vacation period save and except foremen, supervisors, persons above the rank of foreman and supervisor, professional nursing staff and office staff.” (23 employees in unit).

Unit #2: “all employees of Norfolk Haldimand Regional Nursing Home at Port Dover, Ontario, save and except foremen, supervisors, persons above the rank of foreman and supervisor, professional nursing staff, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (23 employees in unit).

0555-84-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Murphy Distributing (Sarnia) Ltd., (Respondent).

Unit: “all employees of the respondent at Sarnia, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff.” (6 employees in unit). (*Having regard to the agreement of the parties*).

0558-84-R: Association of Professional Student Services Personnel, (Applicant) v. The Board of Education for the Durham Region Roman Catholic Separate School Board, (Respondent) v. The Canadian Union of Public Employees, (Intervener).

Unit: "all employees of the respondent engaged as speech pathologists, child care workers, psychometrists, psychologists, attendance counsellors and social workers in the Regional Municipality of Durham, save and except for co-ordinators and persons above the rank of co-ordinator." (10 employees in unit). (*Having regard to the agreement of the parties*).

0575-84-R: Teamsters Local Union 1000, Brewery, Soft Drink, Distillery, Distributors & Miscellaneous Workers, affiliated with the International Brotherhood of Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Erie & Huron Beverages Limited, (Respondent).

Unit: "all office and clerical employees of the respondent at Chatham, Ontario, save and except office manager, persons above the rank of office manager, the executive secretary and persons regularly employed for not more than 24 hours per week." (7 employees in unit). (*Having regard to the agreement of the parties*).

0594-84-R: United Steelworkers of America, (Applicant) v. Grafton-Fraser Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent employed at its distribution center at 40 Ronson Drive in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, display staff, buyers, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (34 employees in unit). (*Having regard to the agreement of the parties*).

0605-84-R: London and District Service Workers' Union, Local 220, S.E.I.U.-A.F.L.-C.I.O.-C.L.C., (Applicant) v. The Freeport Hospital, (Respondent).

Unit: "all office and clerical employees of the respondent at Kitchener, Ontario, regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except supervisors and persons above the rank of supervisor, confidential secretary to the administrator, confidential secretary to the Director of Human Resources (Human Resources clerk) and persons covered by subsisting collective agreements." (3 employees in unit). (*Having regard to the agreement of the parties*).

0606-84-R: London and District Service Workers' Union, Local 220, S.E.I.U.-A.F.L.-C.I.O.-C.L.C., (Applicant) v. The Freeport Hospital, (Respondent).

Unit: "all office and clerical employees of the respondent at Kitchener, Ontario, save and except supervisors, persons above the rank of supervisor, confidential secretary to the administrator, confidential secretary to the Director of Human Resources (Human Resources clerk), persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period and persons covered by subsisting collective agreements." (5 employees in unit). (*Having regard to the agreement of the parties*).

0625-84-R: International Ladies' Garment Workers' Union, (Applicant) v. Bare Essence Fashions Ltd., (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff, designers, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (104 employees in unit). (*Having regard to the agreement of the parties*).

0632-84-R: Christian Labour Association of Canada, (Applicant) v. The Salvation Army The Honourable Ray and Helen Lawson Eventide Home, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Niagara Falls, save and except Director of Nursing, Administrators, Assistant Administrators, office and clerical staff, persons employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (31 employees in unit). (*Having regard to the agreement of the parties*).

0633-84-R: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., (Applicant) v. Louise Marshall Hospital, (Respondent).

Unit: "all office and clerical employees of the respondent at Mount Forest, Ontario regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor and secretary to the administrator." (3 employees in unit). (*Having regard to the agreement of the parties*).

0649-84-R: Labourers' International Union of North America, Local 183, (Applicant) v. Metro International Inc., (Respondent).

Unit: "all employees of the respondent engaged in cleaning at 30 and 35 Charles Street West, Toronto, Ontario, including resident superintendents save and except property managers, persons above the rank of property manager, office and clerical staff." (3 employees in unit). (*Having regard to the agreement of the parties*).

0652-84-R: International Union of Operating Engineers, Local 793, (Applicant) v. Land Grading & Excavating Company, (Respondent).

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman."

Unit #2: "all employees of the respondent in the Municipality of Metropolitan Toronto, and Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

0661-84-R: Labourers' International Union of North America, Local 527, (Applicant) v. Pierre Lareau Inc., (Respondent).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

0662-84-R: International Union of Operating Engineers, Local 793, (Applicant) v. Warren Bitulithic Limited, (Respondent).

Unit: "all employees of the respondent in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Nassagaweya, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

0675-84-R: Labourers' International Union of North America, Local 1059, (Applicant) v. Canal Contractors, A Division of ULS International Inc., (Respondent).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce, and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

0708-84-R: Toronto Motion Picture Projectionists Union Local No. 173 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, (Applicant) v. Peony Films Ltd., carrying on business as The Golden Dragon Theatre, (Respondent).

Unit: "all projectionists of the respondent in the Municipality of Metropolitan Toronto, save and except theatre manager, and persons above the rank of theatre manager." (2 employees in unit). (*Having regard to the agreement of the parties*).

0730-84-R: Labourers' International Union of North America, Local 1059, (Applicant) v. C. H. Excavating Limited, (Respondent).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

0251-84-R: Canadian Union of Operating Engineers and General Workers, (Applicant) v. Yonge-Eglinton Centre Management Services, (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors and superintendents, persons above the rank of supervisor, and superintendents, office and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (58 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		54
Number of persons who cast ballots	52	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		34
Number of ballots marked against applicant		15
Ballots segregated and not counted		2

0341-84-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., (Applicant) v. Seminole Management and Engineering Company, (Respondent) v. Christian Labour Association of Canada, (Intervener).

Unit: "all employees of the respondent employed in the City of Windsor, save and except foremen, persons above the rank of foreman, office and sales staff, students employed during the school vacation period, persons regularly employed for not more than twenty-four (24) hours per week and security guards." (112 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		105
Number of persons who cast ballots	100	
Number of ballots marked in favour of applicant		71
Number of ballots marked in favour of intervener		29

0370-84-R: Local 636, International Brotherhood of Electrical Workers, (Applicant) v. Whitby Hydro Electric Commission, (Respondent) v. The Canadian Union of Public Employees, (Intervener).

Unit: "all employees of the respondent, save and except foremen, persons above the rank of foreman, office staff and persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (14 employees in unit).

Number of names of persons on list as originally prepared by employer		14
Number of persons who cast ballots	12	
Number of ballots marked in favour of applicant		11
Number of ballots marked in favour of intervener		1

0423-84-R: The Canadian Guards Association, (Applicant) v. Citicom Inc., (Respondent).

Unit: "all security guards employed by the respondent in Ottawa, save and except supervisors and persons above the rank of supervisor, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (14 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		16
Number of persons who cast ballots	17	
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list		13
Number of ballots marked in favour of applicant		13
Number of ballots marked against applicant		0
Ballots segregated and not counted		4

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

2702-83-R: United Steelworkers of America, (Applicant) v. Ivaco Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in its Infasco Nut Company Division at 7283 Torbam Road, Mississauga, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during school vacation periods." (70 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer	66	
Number of names of persons who cast ballots	66	
Number of ballots marked in favour of applicant		38
Number of ballots marked against applicant		28

3124-83-R: United Food and Commercial Workers International Union, AFL, CIO, CLC, (Applicant) v. CSP Foods Ltd., Dundas Valley Food Products Division, (Respondent).

Unit: "all employees of the respondent in the Township of Flamborough, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation periods." (35 employees in unit).

Number of names of persons on list as originally prepared by employer	31	
Number of persons who cast ballots	31	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		18
Number of ballots marked against applicant		12

0278-84-R: United Steelworkers of America, (Applicant) v. Zenith Radio Canada Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office, clerical, sales and cafeteria staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (289 employees in unit).

Number of names of persons on revised voters' list		293
Number of persons who cast ballots	286	
Number of spoiled ballots		5
Number of ballots marked in favour of applicant		188
Number of ballots marked against applicant		88
Ballots segregated and not counted		5

Applications for Certification Dismissed — No Vote Conducted

0059-84-R: Ontario Nurses' Association, (Applicant) v. Leamington District Memorial Hospital, (Respondent). (9 employees in unit).

0090-84-R: United Brotherhood of Carpenters and Joiners of America, Local 1030, (Applicant) v. Steenbakkens Lumber Co. Ltd. and Capital Roof Truss (1984) Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent engaged in delivery truck driving at and out of its lumber yard and shop at 3813 Richmond Road, Nepean, Ontario, save and except foremen, persons above the rank of foreman, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (7 employees in unit).

0379-84-R: Canadian Labour Congress Chartered Local 1698, (Applicant) v. 367402 Ontario Ltd., (Respondent). (15 employees in unit).

0400-84-R: Canadian Union of Public Employees, (Applicant) v. The Children's Aid Society of Owen Sound and the County of Grey, (Respondent).

Unit #1: (*See: Bargaining Agents Certified — No Vote Conducted*).

Unit #2: "all employees of the respondent in the County of Grey in the Province of Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except Confidential Secretary to the Director, supervisors and persons above the rank of supervisor." (5 employees in unit). (*Having regard to the agreement of the parties*).

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

0290-84-R: Lumber and Sawmill Workers Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Gateway Building & Supply Limited, (Respondent) v. Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 607, (Intervenors).

Unit: "all construction labourers and all employees engaged in cement finishing, waterproofing and restoration work, and all other employees in the employ of the respondent in the District of Thunder Bay, the District of Rainy River and the District of Kenora, including the Patricia portion, save and except non-working foremen, persons above the rank of non-working foreman and employees covered by subsisting collective agreements to which the respondent is a party." (2 employees in unit).

Number of names of persons on list as originally prepared by employer		2
Number of persons who cast ballots	2	
Number of ballots marked in favour of applicant		0
Number of ballots marked in favour of intervener		2*

0329-84-R: Hotel Employees Restaurant Employees Union, Local 75, (Applicant) v. Ramada Hotel Airport, (Respondent).

Unit: "all employees of the respondent in Mississauga, Ontario, save and except supervisors, those above the rank of supervisor, sales and office staff, security staff, front desk and switchboard staff, banquet department, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (120 employees in unit).

Number of names of persons on list as originally prepared by employer	120	
Number of persons who cast ballots	112	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		36
Number of ballots marked against applicant		73
Ballots segregated and not counted		2

0361-84-R: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., (Applicant) v. The Sisters of St. Joseph of the Diocese of London in Ontario, as owner and operator of St. Joseph's Hospital, London, Ontario, (Respondent).

Unit: "all employees of the respondent in London, Ontario, regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dietitians, student dietitians, social workers, social work assistants, persons engaged in research work, technical personnel (including in this exception, graduate and undergraduate: audiologists, physio-, occupational, psychiatric and speech therapists, psychologists, psychometrists, computer programmers, biomedical repair technicians, certified and non-certified dental assistants, photography technicians and artists-medical illustrators, registered, non-registered and student: laboratory technicians, x-ray technicians, respiratory technicians, electrocardiogram technicians, electroencephalogram technicians, pulmonary technicians, nuclear medicine technicians, ophthalmic technicians, and laboratory assistants), supervisors, persons above the rank of supervisor, foremen, persons above the rank of foreman, chief engineer, office and clerical staff, (including in this exception: ward clerks, admitting clerks, receptionists, safety and security officers, information clerks, mail clerks, cashiers, librarians and switchboard operators) and security guards." (136 employees in unit).

Number of names of persons on revised voters' list		170
Number of persons who cast ballots	86	
Number of ballots marked in favour of applicant		36
Number of ballots marked against applicant	50	

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

3041-83-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers

of America, (U.A.W.), (Applicant) v. Holy Rosary Parish (Thorold) Credit Union Limited, (Respondent).

Unit #1: (See: *Bargaining Agents Certified — No Vote Conducted*).

Unit #2: "all employees of the respondent in Thorold, Ontario regularly employed for not more than 24 hours per week, and students employed during the school vacation period." (6 employees in unit).

Number of names of persons on list as originally prepared by employer		6
Number of persons who cast ballots	6	
Number of ballots marked in favour of applicant		2
Number of ballots marked against applicant		4

0169-84-R: International Union, United Automobile, Aerospace, & Agricultural Implement Workers of America, (U.A.W.) v. (Applicant) v. Rockwell International of Canada Ltd., Wescom Canada Division, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the Town of Halton Hills, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (56 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		55
Number of persons who cast ballots	52	
Number of ballots marked in favour of applicant		14
Number of ballots marked against applicant		31
Ballots segregated and not counted		7

0189-84-R: Health, Office & Professional Employees, a Division of Local 206, Retail, Commercial, & Industrial Union, chartered by the United Food & Commercial Workers International Union, (Applicant) v. 509824 Ontario Limited, carrying on business as Woolwich Lodge, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Guelph, save and except supervisors, persons above the rank of supervisor, executive secretary to the Administrator and the executive secretary to the Assistant Administrator." (31 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		24
Number of persons who cast ballots	18	
Number of ballots marked in favour of applicant		8
Number of ballots marked against applicant		10

0337-84-R: The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 46, (Applicant) v. Berg Chilling Systems Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Metropolitan Toronto save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period." (27 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		20
Number of persons who cast ballots	20	
Number of ballots marked in favour of applicant		9
Number of ballots marked against applicant		11

0417-84-R: Teamsters Local Union 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Cory Canada Inc. (c.o.b. as Cory Coffee Services), (Respondent) v. Group of Employees, (Objectors).

Unit: "all office and clerical employees of the respondent in Metropolitan Toronto, save and except office manager, personnel manager, persons above the rank of office manager and personnel manager, and persons employed less than 24 hours per week and students employed during the school vacation period." (17 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		15
Number of persons who cast ballots	15	
Number of ballots marked in favour of applicant		4
Number of ballots marked against applicant		11

APPLICATIONS FOR CERTIFICATION WITHDRAWN

2461-83-R: The United Association of Journeymen, and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46, (Applicant) v. Canadian National Exhibition Association, (Respondent) v. The Canadian Union of Public Employees, (Intervener).

3079-83-R: Labourers' International Union of North America, Local 183, (Applicant) v. Bot Holdings, Bot Construction Limited, Bot Construction Canada Limited and Clarkson Construction Company Limited, (Respondents).

0182-84-R: The United Brotherhood of Carpenters and Joiners of America — Local 2486, (Applicant) v. Northway Industries Ltd., (Respondent).

0252-84-R: United Brotherhood of Carpenters and Joiners of America, Local Union 2679, (Applicant) v. ill Limited, (Respondent).

0465-84-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. Abex Industries Ltd., Division Canadian Brake Lock, (Respondent).

0474-84-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. T. Eaton Company Limited, (Respondent).

0503-84-R: Labourers' International Union of North America, Local 183, (Applicant) v. Greenwin Property Management and/or Foris Investments Limited and Rating Investments Limited carrying on business as Parkview Management, (Respondent) v. The Canadian Union of Public Employees, (Intervener).

0510-84-R: International Molders & Allied Workers Union, (Applicant) v. Central Soya of Canada Limited, (Respondent).

0539-84-R; 0540-84-R: Hotel Employees Restaurant Employees Union, Local 75, (Applicant) v. Canada Catering Co. Ltd., (Respondent).

0595-84-R: Labourers' International Union of North America, Local 607, (Applicant) v. Leo Alarie & Sons Limited, (Respondent).

0609-84-R: Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant).

0630-84-R: Health, Office & Professional Employees, a Division of the United Food & Commercial Workers Local 206, chartered by the United Food & Commercial Workers International Union, C.L.C.,

A.F.L. — C.I.O., (Applicant) v. Hallowell House Ltd. Nursing & Convalescent Home, (Respondent) v. S.E.I.U., Local 183, (Intervener).

0663-84-R: Hotel Employees, Restaurant Employees, Union Local 75, (Applicant) v. North Mount Caterers Ltd., (Respondent).

0668-84-R: Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Tryverse Products Ltd., (Respondent).

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

1517-83-R: Service Employees Union, Local 183, A.F.L., C.I.O., C.L.C., (Applicant) v. Centre Hastings Nursing Home Limited, and Miklos and Mary Horvath carrying on business as Fabeth Nursing Home and Horvaths Retirement Home, (Respondents).

1853-83-R: Teamsters Local Union No. 419, (Applicant) v. Metro Toronto News Company Limited and Magcan Traffic Services Limited, (Respondents). (*Withdrawn*).

2720-83-R: Ontario Sheet Metal Workers Conference and Sheet Metal Workers International Association, Local 397, (Applicants) v. F.D.V. Construction Limited and 515112 Ontario Limited carrying on business as Bluebird Construction, (Respondents).

3067-83-R: International Brotherhood of Electrical Workers, Local 353, (Applicant) v. Trident Holdings Limited c.o.b. as Trident Electric and Gambin Electric Co. Ltd., (Respondents).

0187-84-R: Local 1316, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Huron Drywall Limited and Melrose Steel & Acoustics Ltd., (Respondent) v. Group of Employees, (Objectors).

0270-84-R: United Brotherhood of Carpenters and Joiners of America, Local 2486, (Applicant) v. Northway Industries Ltd. and Kahkonen Construction (1979) Ltd., (Respondent).

0296-84-R: United Brotherhood of Carpenters and Joiners of America, Local 1316, (Applicant) v. Huron Drywall Limited and Melrose Steel & Acoustics Ltd., (Respondents).

0321-84-R: International Ladies Garment Workers Union, (Applicant) v. Trojan Sportswear Limited and Pacific Odyssey Limited, (Respondents).

0395-84-R: International Union of Bricklayers and Allied Craftsmen, Ontario Provincial Conference and The International Union of Bricklayers and Allied Craftsmen, Local 12, (Applicants) v. Able Masonry (Eastern) Limited Pro Construction (Kitchener-Waterloo) Limited, (Respondents).

0396-84-R: Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 1081, (Applicants) v. Able Masonry (Eastern) Limited Pro Construction (Kitchener-Waterloo) Limited, (Respondents).

0454-84-R: United Brotherhood of Carpenters and Joiners of America, Local 1669, (Applicant) v. Pasquali D'Angelo, D'Angelo Bro's Limited General Contractors, D'Angelo Construction Before Apartments Limited, Befaro Construction, Befaro Home Improvements and Building Supplies, (Respondents).

0456-84-R: Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 1081, (Applicants) v. Stradiotto Brothers Construction Limited, Stradiotto Inc., Stoneview Masonry Limited, (Respondents).

0489-84-R: Labourers' International Union of North America, Ontario Provincial District Council, (Applicants) v. Cam-Teves Contractors Ltd. and Wil-Mat Holdings Ltd., (Respondents).

SALE OF A BUSINESS

2720-83-R: Ontario Sheet Metal Workers Conference and Sheet Metal Workers International Association, Local 397, (Applicants) v. F.D.V. Construction Limited and 515112 Ontario Limited carrying on business as Bluebird Construction, (Respondents).

3067-83-R: International Brotherhood of Electrical Workers, Local 353, (Applicant) v. Trident Holdings Limited c.o.b. as Trident Electric and Gambin Electric Co. Ltd., (Respondents).

0229-84-R: Association of Allied Health Professionals: Ontario for and on behalf of its chartered Local Association #3, (Applicant) v. The Religious Hospitalers of Saint Joseph of the Hotel Dieu of Kingston and Kingston General Hospital, (Respondents).

0321-84-R: International Ladies Garment Workers Union, (Applicant) v. Trojan Sportswear Limited and Pacific Odyssey Limited, (Respondents).

0395-84-R: International Union of Bricklayers and Allied Craftsmen, Ontario Provincial Conference and The International Union of Bricklayers and Allied Craftsmen, Local 12, (Applicants) v. Able Masonry (Eastern) Limited Pro Construction (Kitchener-Waterloo) Limited, (Respondents).

0396-84-R: Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 1081, (Applicants) v. Able Masonry (Eastern) Limited Pro Construction (Kitchener-Waterloo) Limited, (Respondents).

0456-84-R: Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 1081, (Applicants) v. Stradiotto Brothers Construction Limited, Stradiotto Inc., Stoneview Masonry Limited, (Respondents).

0489-84-R: Labourers' International Union of North America, Ontario Provincial District Council, (Applicants) v. Cam-Teves Contractors Ltd. and Wil-Mat Holdings Ltd., (Respondents).

0594-83-R: The Labourers' International Union of North America, Local 1059, (Applicant) v. The John Hayman & Sons Company, Limited Ontario and King Limited, (Respondents).

UNION SUCCESSOR RIGHTS

0428-84-R: Energy and Chemical Workers Union, (Applicant) v. Specialized Parcel Delivery and Handlers Union, Local 1681, Canadian Labour Congress, (Respondent).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

2309-83-R: Becky La Mantia and Mary Moore, (Applicants) v. Graphic Communications International Union, Local 517, (Respondent) v. Sumner Press, (Intervener).

Unit: "employees of Sumner Press employed in the binding and finishing processes." (3 employees in unit). (*Granted*).

Number of names of persons on revised voters' list
Number of persons who cast ballots

3
3

Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	2

2755-83-R: Lynne Kathryn Clouston, (Applicant) v. Retail, Commercial and Industrial Union, Local 206, Chartered by the United Food & Commercial Workers International Union, C.L.C., A.F.L. — C.L.C., (Respondent).

Unit: "all employees of Fabricland Distributors Markham, who are regularly employed for not more than 24 hours per week, and students employed during the school vacation period, save and except store manager and all employees above the rank of store manager." (3 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared by employer	5
Number of persons who cast ballots	5
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	5

2949-83-R: Nesley Blackwood, (Applicant) v. International Brotherhood of Painters and Allied Trades, Local Union 1891, (Respondent) v. Johnson's Painting Co. Ltd., (Intervener #1), 526132 Ontario Incorporated carrying on business as Kos Decorating, (Intervener #2).

Unit: "all painters and painters' apprentices in the employ of Johnson's Painting Co. Ltd. and 526132 Ontario Incorporated carrying on business as Kos Decorating in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit). (*Granted*).

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	2

3127-83-R: Employees of Parr's Print & Litho Ltd., (Applicant) v. Graphic Arts International Union, (Respondent) v. Parr's Print & Litho Limited, (Intervener).

Unit: "all employees of the intervener at Markham, Ontario, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, security guard, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (37 employees in unit). (*Dismissed*).

3128-83-R: Michael Saunders, (Applicant) v. Operative Plasters' and Cement Masons' International Association of the United States and Canada, Local 172, (Respondent) v. Hogan Restoration Ltd., (Intervener).

Unit: "all employees of the respondent in Ontario save and except those above the rank of working foreman." (6 employees in unit). (*Dismissed*).

3129-83-R: Paul Neeson, (Applicant) v. The United Brotherhood of Carpenters and Joiners of America, Carpenters' District Council of Toronto and Vicinity, (Respondent). (9 employees in unit). (*Dismissed*).

3132-83-R: Peter McEwan, Charles McEwan and Richard Long, (Applicants) v. Local 785, United Brotherhood of Carpenters and Joiners of America, (Respondent). (3 employees in unit). (*Dismissed*).

0286-84-R: Larry Snider, (Applicant) v. United Steel Workers of America, Local 1177, (Respondent). (4 employees in unit). (*Withdrawn*).

0287-84-R: Jeffrey Babineau, (Applicant) v. Canadian Paperworkers Union, Local 343, (Respondent) v. Milno-Markham Manufacturing Company Limited, (Intervener). (8 employees in unit). (*Dismissed*).

0509-84-R: Wesley Allan Moore, (Applicant) v. Sheet Metal Workers International Association, Local 504, (Respondent). (1 employee in unit). (*Withdrawn*).

0532-84-R: The employees of Northwest Merchants. (Keewatin Place) Consisting of: Roxanne Chambers, Elan Crowley, Sandy Jolicouer, Elizabeth Wojewoda, Laura Parker, (Applicant) v. Retail Clerks Union, Local 409, (Respondent).

Unit: "all employees of Northwest Merchants Limited Canada in the Town of Keewatin, Ontario, save and except manager, persons above the rank of manager, and secretary book-keeper." (7 employees in unit). (*Granted*).

0590-84-R: Peter Graham, Steve Albert, Louise Brunet, Brent Chevrier, Barbara Desnoyers, Linda Roberts, Cathy Halikas, Brian Moore, Lynn Spano, (Applicants) v. Retail, Wholesale and Department Store Union, Local 440, (Respondent).

Unit: "all employees of Data Ribbon Ltd. in the City of Ottawa, save and except Production Manager, those above the rank of Production Manager, office and sales staff." (9 employees in unit). (*Granted*).

REFERRAL AS TO APPOINTMENT OF CONCILIATION OFFICER

2618-83-M: The City of Mississauga, (Transit Department), (Employer) v. Amalgamated Transit Union, Local #1572, (Trade Union). (*Granted*).

0017-84-M: St. Raphael's Nursing Home (Kitchener) (Employer) v. London & District Service Workers Union, Local 220, (Trade Union). (*Dismissed*).

0272-84-M: Dedi-Care Group Incorporated, (Employer) v. Christian Labour Association of Canada, (Trade Union). (*Terminated*).

APPLICATION FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

0683-84-U: Trident Holdings Limited, c.o.b. as Trident Electric, (Applicant) v. International Brotherhood of Electrical Workers, Local 353, Teodor Bacic, Huscyn Basciftci, Steve Biase, Kalman Csupor, Mike Faith, Beato Guiseppe, Nick Kokotsis, Doug McGuire, Tony Romano, Johann Streisslberger, Mario Trasolini, Robert White, (Respondents). (*Granted*).

APPLICATION FOR DECLARATION OF UNLAWFUL LOCKOUT

3113-83-U: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 552, (Applicant) v. The Board of Education for the City of Windsor, (Respondent). (*Granted*).

COMPLAINTS OF UNFAIR LABOUR PRACTICE

0220-83-U: Hotels, Clubs, Restaurants & Tavern Employees' Union, Local 261, (Complainant) v. The Mill Restaurant, (Respondent). (*Withdrawn*).

0258-83-U: Hotels, Clubs, Restaurants & Tavern Employees' Union, Local 261, (Complainant) v. The Mill Restaurant, (Respondent). (*Withdrawn*).

0890-83-U: Douglas G. Poole, (Complainant) v. International Union of Elevator Constructors designated employee bargaining agency for and on behalf of its affiliated locals, (Respondent). (*Dismissed*).

1347-83-U: Martin Jansen, (Complainant) v. International Brotherhood of Electrical Workers, Local 636, (Respondent) v. Public Utilities Commission of the Corporation of the City of Trenton, (Intervener). (*Withdrawn*).

1470-83-U: Hotel Employees and Restaurant Employees Union, Local 75, (Applicant/Complainant) v. The Polish Alliance Friendly Society of Canada Branch No. 19, Social Club, (Respondent) v. Group of Employees, (Objectors). (*Granted*).

2253-83-U; 2299-83-U: International Ladies' Garment Workers' Union, (Complainant) v. Main Knitting Mills Canada Ltd., (Respondent). (*Granted*).

2467-83-U: Julius Kiss, (Complainant) v. Windsor Mouldmakers Union, Local 1680 — C.L.C., (Respondent) v. International Tools, Division of International Tools (1973) Limited, (Intervener). (*Dismissed*).

2545-83-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC, (Complainant) v. Sniderman Radio Sales and Service Limited, (Respondent). (*Withdrawn*).

2800-83-U: Service Employees Union, Local 204, (Complainant) v. Trailer Master Freight Carriers Limited c.o.b. as Atripco Delivery Service, (Respondent). (*Dismissed*).

3085-83-U: John (Jack) James, (Complainant) v. Labourers' International Union of North America, and its Locals 493 and 527, (Respondents). (*Dismissed*).

0131-84-U: International Association of Machinists and Aerospace Workers, (Complainant) v. "Lustro" A Division of Daniel LeBlanc Plastics, (Respondent). (*Withdrawn*).

0147-84-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC, (Complainant) v. T. Eaton Company Limited, (Respondent). (*Dismissed*).

0171-84-U: Domenic Masellis, (Complainant) v. Loblaws Limited, (Respondent) v. United Food and Commercial Workers Int'l Union, (Intervener).

0192-84-U: Canadian Union of Operating Engineers and General Workers, (Complainant) v. Sadema Lumber Products, (Respondent). (*Withdrawn*).

0211-84-U: Antonio Difalco, (Complainant) v. United Brotherhood of Carpenters and Joiners of America, General Workers' Union, Local 1030 and Alessandro Buccieri and Ivo Manoni, (Respondents). (*Withdrawn*).

0214-84-U: United Rubber, Cork, Linoleum & Plastic Workers of America, Local 126, (Complainant) v. Viceroy Rubber & Plastics Limited and Ron Bruhm, (Respondents). (*Withdrawn*).

0223-84-U: Canadian Union of Public Employees, (Complainant) v. Participation House Brantford, (Respondent). (*Withdrawn*).

0227-84-U: Ontario Public Service Employees Union, (Complainant) v. Board of Education for the City of York and Ontario Secondary School Teachers' Federation, (Respondents). (*Withdrawn*).

0231-84-U: Desmond A. Christopher, (Complainant) v. Canadian Union of Public Employees, Local 79, (Respondent) v. The Corporation of the City of Toronto, (Intervener). (*Dismissed*).

0234-84-U: Motion Picture Studio Production Technicians, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 873, (Complainant) v. Canadian Independent Commercial Producers Association, et al, (Respondents). (*Withdrawn*).

0239-84-U: Jocelyne Thurlow, (Complainant) v. United Food & Commercial Workers International Union, Local 617, Hamilton, Ontario, (Respondent) v. Guelph Beef Centre Inc., (Intervener). (*Withdrawn*).

0241-84-U: Douglas Glen Frey, (Complainant) v. International Union of Operating Engineers, Local 793, (Respondent). (*Withdrawn*).

0255-84-U: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., (Complainant) v. Judricks Enterprises Ltd., (Respondent). (*Withdrawn*).

0260-84-U; 0261-84-U: Gerard F. Dunphy, (Complainant) v. United Food and Commercial Workers, Local 175, (Respondent) v. Shopsy's Foods Division of Unox Inc., (Intervener). (*Withdrawn*).

0263-84-U: Local 280 Bartenders and Beverage Dispensers of H.E.R.E. International Union, (Complainant) v. Pine Tree Tavern, (Respondent). (*Dismissed*).

0293-84-U: Rick Bellamy, (Complainant) v. Canadian Union of General Freight Handlers Independent, (Respondent). (*Dismissed*).

0294-84-U: Rick Bellamy, (Complainant) v. Shuntmaster Ltd., (Respondent). (*Dismissed*).

0303-84-U: Amalgamated Clothing and Textile Workers Union, Local 1332, (Complainant) v. BCL Canada Inc., (Respondent). (*Dismissed*).

0309-84-U: Albert M. Chisholm, (Complainant) v. Teamsters' Local Union No. 230, (Respondent) v. The Electrical Power Systems Construction Association, (Intervener). (*Withdrawn*).

0325-84-U: United Food and Commercial Workers International Union, AFL-CIO-CLC, (Complainant) v. Swiss Chalet Employers' Association on behalf of its member LML Foods Inc., (Respondent). (*Withdrawn*).

0326-84-U: United Food and Commercial Workers International Union AFL-CIO-CLC, (Complainant) v. J. Paiva Foods Ltd., (Respondent). (*Withdrawn*).

0356-84-U; 0374-84-U: Dennis Cooper Local 557, (Complainant) v. International Brotherhood of Painters & Allied Trades, (Respondent). (*Withdrawn*).

0376-84-U: David Brady, (Complainant) v. Ontario Public Service Employees Union, (Respondent) v. Board of Governors of Fanshawe College of Applied Arts & Technology, (Intervener). (*Withdrawn*).

0429-84-U: K. Vanderwel, of the Civic Institute of Professional Personnel, (Complainant) v. Ottawa-Carleton Regional Health Unit, (Respondent). (*Withdrawn*).

0448-84-U: Service Employees' Union, Local 210, affiliated with Service Employees' International Union, AFL-CIO-CLC, (Respondent) v. La Chaumiere Rest Home Ltd., (Respondent). (*Withdrawn*).

0490-84-U: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, (U.A.W.), (Complainant) v. Holy Rosary Parish (Thorold) Union Limited, (Respondent). (*Withdrawn*).

0496-84-U: The Carpenters' District Council of Toronto and Vicinity United Brotherhood of Carpenters and Joiners of America, (Complainant) v. Hammercraft Limited, (Respondent). (*Withdrawn*).

0512-84-U: Metropolitan Toronto Sewer and Watermain Contractors Association, (Complainant) v. A Council of Trade Unions, acting as the representative and agent of Teamsters Local Union 230 and Labourers' International Union of North America, Local Union 183; Teamsters Local Union 230; Labourers' International Union of North America, Local Union 183; and John Stefanini, (Respondents). (*Withdrawn*).

0525-84-U: Michael Chomica, (Complainant) v. Service Employees International Union, Local 528, (Respondent). (*Withdrawn*).

0529-84-U: John Grabowski, (Complainant) v. Office and Professional Employees International Union, Local 225, Ottawa, Eastern Council O.P.E.I.U., (Respondent). (*Withdrawn*).

0563-84-U: Metropolitan Toronto Sewer and Watermain Contractors Association, (Complainant) v. International Union of Operating Engineers, Local 793, Peter Diemtric, John Ricciuto, Frank Giles and Joe Kennedy, (Respondents). (*Withdrawn*).

0576-84-U; 0577-84-U; 0664-84-U: Retail, Wholesale, and Department Store Union, AFL-CIO-CLC, (Complainant) v. Sylra Ltd., operating as Crosstown Department Stores, (Respondent). (*Withdrawn*).

0670-84-U: Canadian Union of Public Employees, Local 1600, (Complainant) v. The Board of Management of the Metropolitan Toronto Zoo, (Respondent). (*Withdrawn*).

0680-84-U: Todd Uren, (Complainant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada Local Union 800, (Respondent). (*Withdrawn*).

0681-84-U: Viceroy Rubber & Plastics Limited, (Complainant) v. United Rubber, Cork, Linoleum & Plastic Workers of America, Local 126, (Respondent). (*Withdrawn*).

0682-84-U: Morris Wasserman, (Complainant) v. Local 253, United Garment Workers of America, (Respondent). (*Withdrawn*).

0692-84-U: William Gay, (Complainant) v. International Association of Machinists and Aerospace Workers Local Lodge 1168, (Respondent). (*Withdrawn*).

0698-84-U: John Havlin, (Complainant) v. United Brotherhood of Carpenters & Joiners of America, Local Union 38, (Respondent). (*Withdrawn*).

0699-84-U: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Complainant) v. Ontario Liquor Boards Employees Union, (Respondent). (*Withdrawn*).

0765-84-U: National Brewery Workers' Union, Local No. 1, (Complainant) v. Labatt's Ontario Breweries (London Plant), (Respondent). (*Withdrawn*).

0778-84-U: Jerry Edward Pool, (Complainant) v. Pat O'Reilly, (Respondent). (*Withdrawn*).

JURISDICTIONAL DISPUTES

0885-81-JD: Canadian Union of Public Employees, Local 1000, C.L.C. — Ontario Hydro Employees Union, (Complainant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada and Ontario Hydro, (Respondents). (*Dismissed*).

1561-81-JD: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, (Complainant) v. Ontario Hydro and Canadian Union of Public Employees, Local 1000, C.L.C. — Ontario Hydro Employees Union, (Respondents). (*Dismissed*).

2607-83-JD: Teamsters Union, Local 419, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. The Council of Printing Industries on behalf of Southam Murray Printing, and The Graphic Communications International Union, Local 500M, (Respondents). (*Dismissed*).

0072-84-JD: United Brotherhood of Carpenters and Joiners of America, Local 1669, (Complainant) v. Plibrico (Canada) Ltd.; and Labourers' International Union of North America, Local 607, (Respondents). (*Withdrawn*).

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

3088-83-M: The Regional Municipality of Niagara, (Applicant) v. Ontario Nurses' Association, (Respondent). (*Granted*).

3094-83-M: Office & Professional Employees International Union, Local 236, 752 Leslie Avenue, Thunder Bay, Ontario, P7A 2A2, (Applicant) v. Provincial Papers Division of Abitibi-Price Inc., Box 2450, Thunder Bay, Ontario, (Respondent). (*Withdrawn*).

0602-84-M: Canadian Union of Public Employees, Local 2073, (Applicant) v. Canadian Hearing Society, (Respondent). (*Terminated*).

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

0165-84-OH: Raymond Lynch, (Complainant) v. Rulco Demolitions Ltd., (Respondent). (*Granted*).

0291-84-OH: Marlene Lynne Braithwaite, (Complainant) v. Father Hannan, (Respondent). (*Withdrawn*).

0362-84-OH: Great Lakes Local 39, Canadian Paperworkers Union on behalf of Doug Brown, Len Sitch, George Niven, Steve Throupe, Vernon Maki, (Complainant) v. Great Lakes Forest Products Company Ltd. Kraft "A" Mill, (Respondent). (*Withdrawn*).

0367-84-OH: United Electrical, Radio and Machine Workers of America, Local 545, (Complainant)

v. Canadian General Electric and/or Black & Decker Manufacturing Co., (Respondent). *(Withdrawn)*.

COLLEGES COLLECTIVE BARGAINING ACT

Application for Religious Exemption

0376-84-U: David Brady, (Complainant) v. Ontario Public Service Employees Union, (Respondent) v. Board of Governors of Fanshawe College of Applied Arts & Technology, (Intervener). *(Withdrawn)*.

CONSTRUCTION INDUSTRY GRIEVANCES

0796-81-M: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. Lewis Insulation Services Inc., (Respondent) v. The Master Insulators' Association of Ontario, Incorporated, (Intervener). *(Granted)*.

1361-83-M: United Brotherhood of Carpenters and Joiners of America, Local Union 1669, (Applicant) v. D'Angelo Bros. Limited, Befaro Apartments Limited, Befaro Home Improvements & Building Supplies, (Respondents). *(Granted)*.

2352-83-M: United Brotherhood of Carpenters and Joiners of America, Local Union 1669, (Applicant) v. Michieli Brothers Construction, (Respondent). *(Withdrawn)*.

2901-83-M: Labourers' International Union of North America, Local 1059, (Applicant) v. Duron Ontario Limited, (Respondent). *(Withdrawn)*.

0027-84-M: Labourers' International Union of North America, Local 183, (Applicant) v. Gerry Macera Contracting Ltd., (Respondent). *(Withdrawn)*.

0036-84-M: Form Work, Council of Ontario and Labourers' International Union of North America, Local 837, (Applicants) v. Conview Forming Limited, (Respondent). *(Withdrawn)*.

0105-84-M: United Brotherhood of Carpenters and Joiners of America, Local 494, (Applicant) v. R.C. Pruefer Co. Ltd., (Respondent). *(Withdrawn)*.

0202-84-M: The Operative Plasterers' and Cement Masons' International Association of the United States and Canada Local 598, (Applicant) v. Insulation Thermo Confort Inc., (Respondent). *(Withdrawn)*.

0271-84-M: United Brotherhood of Carpenters and Joiners of America, Local 38, (Applicant) v. A. Volpatti Plastering and Construction Ltd., (Respondent). *(Withdrawn)*.

0285-84-M: The Operative Plasterers' and Cement Masons' International Association of the United States and Canada Local 598, (Applicant) v. Insulation Thermo Confort Inc., (Respondent). *(Withdrawn)*.

0310-84-M; 0311-84-M: International Brotherhood of Electrical Workers, Local 353, (Applicant) v. Trident Holdings Limited c.o.b. as Trident Electric, (Respondent). *(Dismissed)*.

0377-84-M: The Ontario Council of the International Brotherhood of Painters and Allied Trades and The International Brotherhood of Painters and Allied Trades, Local 114, (Applicant) v. Biron Painting & Decorating Limited, (Respondent). *(Granted)*.

0449-84-M: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, (Applicant) v. Banchini Ltee., (Respondent). (*Withdrawn*).

0492-84-M: Christian Labour Association of Canada, (Applicant) v. Maple Engineering and Construction (Canada) Limited, (Respondent). (*Withdrawn*).

0528-84-M: International Brotherhood of Electrical Workers, Local 353, (Applicant) v. Trident Holdings Limited c.o.b. as Trident Electric, (Respondent). (*Dismissed*).

0543-84-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Pratting Construction Limited, (Respondent). (*Granted*).

0544-84-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Big H. Construction, (Respondent). (*Granted*).

0556-84-M: Labourers' International Union of North America, Local 247, (Applicant) v. Hans & Gunther Mason Contractor Ltd, (Respondent). (*Withdrawn*).

0574-84-M: International Union of Bricklayers and Allied Craftsmen, Local 2, (Applicant) v. Municipality of Metropolitan Toronto, Metropolitan Toronto Housing Company Limited, (Respondent). (*Withdrawn*).

0581-84-M: Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local 598, (Applicant) v. Gryphon Waterproofing Ltd., (Respondent). (*Withdrawn*).

0585-84-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Latto Construction Limited, (Respondent). (*Granted*).

0598-84-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of Canada and The United States and Canada, Local 46, (Applicant) v. Megatech Contracting Ltd., (Respondent). (*Withdrawn*).

0599-84-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 416, (Applicant) v. Irema Corporation Ltd., (Respondent). (*Withdrawn*).

0600-84-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 416, (Applicant) v. Precise Cooling Ltd, (Respondent). (*Withdrawn*).

0610-84-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. O.S.C. Partitions Limited, (Respondent). (*Withdrawn*).

0612-84-M: Labourers' International Union of North America, Local 183, (Applicant) v. Jovin Contracting Limited, (Respondent). (*Withdrawn*).

0636-84-M: International Association of Bridge, Structural & Ornamental Ironworkers, Local 759, (Applicant) v. Sheaffer-Townsend Ltd., (Respondent). (*Granted*).

0637-84-M: Labourers' International Union of North America, Local 183, (Applicant) v. Roma Excavating & Grading, (Respondent). (*Withdrawn*).

0638-84-M: Labourers' International Union of North America, Local 183, (Applicant) v. Unidrain Construction Ltd., (Respondent). (*Withdrawn*).

0640-84-M: Labourers' International Union of North America, Local 183, (Applicant) v. C. D. C. Contracting, A Division of Patron Contracting Limited, (Respondent). (*Granted*).

0641-84-M: Labourers' International Union of North America, Local 183, (Applicant) v. Toronto Underground Contracting Ltd., (Respondent). (*Withdrawn*).

0642-84-M: Labourers' International Union of North America, Local 183, (Applicant) v. Poce Construction Ltd., (Respondent). (*Withdrawn*).

0647-84-M: Ontario Allied Construction Trades Council, (Applicant) v. Electrical Power Systems Construction Association, (Respondent). (*Withdrawn*).

0665-84-M: Labourers' International Union of North America, Local 1081, (Applicant) v. McKinlays of Cambridge Ltd., (Respondent). (*Granted*).

0677-84-M: The Ontario Provincial Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, Local 249, Kingston, Ontario, (Applicant) v. Ball Bros. Ltd., (Respondent). (*Withdrawn*).

0678-84-M: Labourers' International Union of North America, Local 183, (Applicant) v. 451688 Ontario Ltd., (Respondent). (*Withdrawn*).

0679-84-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Ferracon Construction Limited, (Respondent). (*Granted*).

0688-84-M; 0690-84-M: Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, Local 1425, (Applicant) v. Calorific Construction Limited, (Respondent). (*Withdrawn*).

0695-84-M: Labourers' International Union of North America, Local 506, (Applicant) v. Olympia & York Developments Ltd., (Respondent). (*Withdrawn*).

0700-84-M: Teamsters Local Union No. 230, Ready Mix, Building Supply, Hydro and Construction Drivers, Warehousemen and Helpers, (Applicant) v. Bot Construction (Canada) Limited Sudbury Area, (Respondent). (*Withdrawn*).

0711-84-M: Labourers' International Union of North America, Local 183, (Applicant) v. Miwel Construction, (Respondent). (*Withdrawn*).

0712-84-M: Labourers' International Union of North America, Local 183, (Applicant) v. Devon Construction Limited, (Respondent). (*Withdrawn*).

0723-84-M: Labourers' International Union of North America, Local 183, (Applicant) v. Zilaer Forming Ltd., (Respondent). (*Withdrawn*).

0741-84-M: Labourers' International Union of North America, Local 1036, (Applicant) v. Quality General Contracting Co. Inc., (Respondent). (*Withdrawn*).

0763-84-M: International Association of Bridge, Structural and Ornamental Iron Workers, Local Union No. 721, (Applicant) v. Kawneer Co. Canada Ltd., (Respondent). (*Withdrawn*).

0773-84-M; 0774-84-M: Labourers' International Union of North America, Local 183, (Applicant) v. Pemrow Pipelines Construction Co. Limited, (Respondent). (*Granted*).

0823-84-M: Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Columbia Interior Contractors, (Respondent). (*Withdrawn*).

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1164-84-U Acme Building & Construction Limited, Applicant, v. International Brotherhood of Electrical Workers, Local 1687 and Lou Popvitch, Respondents

Construction Industry — Strike — Unionized tradesmen not crossing picket line at construction project — Fact that pickets informational only no defence — Unlawful strike probable and reasonable consequence — Cease and desist order directed under amended legislative provision

BEFORE: M. G. Mitchnick, Vice-Chairman.

APPEARANCES: *M. Contini and Jorma Vainio for the applicant; Larry Lineham for the respondents.*

DECISION OF THE BOARD; August 8, 1984

1. This is an application for a declaration and direction pursuant to the provisions of section 135 of the *Labour Relations Act*, as amended by an Act to amend the *Labour Relations Act*, S.O. 1984, c.34, s. 3 (proclaimed in force June 27, 1984). It should be noted that brief reasons for decision were given in conjunction with an oral direction at the end of the hearing of this matter on August 8, 1984.

2. The applicant, Acme Building & Construction Limited, is a general contractor engaged in a project in the New Sudbury Shopping Centre, a new shopping mall in the City of Sudbury still partly under construction. The specific project for which Acme holds the contract is the construction of the office quarters of the Sudbury Regional Credit Union. Acme has a collective bargaining relationship with the carpenters, labourers, and rodmen, but not the electricians. It subcontracted the electrical work on this project to a non-union company, Menard Electric. A tenant of the owner, Campeau, having work done for itself elsewhere in the Mall, also contracted work out to a non-union electrical company. On Friday, July 27, 1983, the International Brotherhood of Electrical Workers, Local 1687, put a picketline on both "construction" entrances to the shopping centre, from 7 o'clock to 10 o'clock in the morning. That had the effect of stopping work on all projects. The respondent Lou Popovitch, the Business Manager of Local 1687, met with Campeau and Eaton, the other general contractor on site, that same day, and Campeau agreed that the electrical work of its tenant would be re-let to a union contractor. Campeau and Eaton also suggested that the picketing be confined to Acme's job in the Mall, and that Acme's name appear on the "unfair practices" signs being carried by the I.B.E.W. picketers. Mr. Popovitch agreed. Mr. Popovitch then telephoned Mr. Spiegel of Acme, and told him the picket-line would remain until Menard Electric was replaced, or signed with the I.B.E.W.. Mr. Spiegel indicated that Menard would not be replaced.

3. On Tuesday, July 31st the picket line re-appeared at the Mall, this time in the interior corridor outside Acme's construction project, and with "Acme" hand-written onto the picket signs. No tradesmen of the unionized subcontractors of Acme have crossed the picket line to perform work since that time, although reporting for their shift each morning to see whether the picket line continued. The only exception to that was the dropping off of a load of lathing materials on the morning of August 1st, and only after the respondent union's president gave his approval for that endeavour.

4. The Board is satisfied from the evidence that at least some of the employees working for sub-contractors under provincial agreements at the job site have been engaging in an unlawful strike. Mr. Lineham, appearing and testifying for the respondents, emphasized that the picketers physically prevented or threatened no one from crossing the line to go to work. He asserted, not in a facetious way, that the picketers "did not tell anyone not to go to work", and that the purpose of the picket line was "informational" only, i.e., to advise the members of the Sudbury public of what kind of practices were being carried on on this project. The problem with that explanation is that it has long been recognized in this province that the affiliated building trades of the construction industry can be expected to, and do, respect each other's picket-line, without having to be expressly "told" to do so. See, e.g. *Smith Bros. Construction Co. Ltd. v. Jones* [1955] 4 D.L.R. 255 (H.C.) where McLennan, J., observed:

There was no evidence that the pickets did anything else than walk up and down at the site of the construction jobs, carrying the signs. There was no evidence of any violence or disturbance or persuasion of any kind other than the mere fact of their presence with the signs, and it was not suggested there was any libel. However, in my opinion, if the development of the trade union movement has reached the point where workers will not cross a picket line to go to work, that is just as effective an interference with contractual relations as any other form of restraint might be. . .

5. Section 135 has now been amended to read:

(1) Where, on the complaint of an interested person, trade union, council of trade unions or employers' organization, the Board is satisfied that a trade union or council of trade unions called or authorized or threatened to call or authorize an unlawful strike or that an officer, official or agent of a trade union or council of trade unions counselled or procured or supported or encouraged an unlawful strike or threatened to engage in an unlawful strike *or any person has done or is threatening to do any act that the person knows or ought to know that, as a probable and reasonable consequence of the act, another person or persons will engage in an unlawful strike*, it may direct what action, if any, a person, employee, employer, employer's organization, trade union or council of trade unions and their officers, officials or agents shall do or refrain from doing with respect to the unlawful strike or the threat of an unlawful strike.

[emphasis added]

The legislature has added the underlined words, but even before that was done, the Board, reflecting the reality of the construction industry, had issued cease-and-desist directions on the same basis against this kind of peaceful but unlawful activity. See e.g. *Valentine Developments*, [1973] OLRB Rep. Oct. 537; *Wheelabrator Corporation of Canada Ltd.*, [1974] OLRB Rep. July 490. On the basis of practice in the industry, as well as on the unequivocal evidence placed before the Board, it cannot now be argued that the respondents' picketing activities were and are not acts that the respondents knew or ought to have known would, as a probable and reasonable consequence, cause the other trades on the job to engage in an unlawful strike.

6. The Board accordingly directs the respondents and any related persons to whom notice of this order may come to cease and desist in their present picketing activities at the applicant's

job site in the New Sudbury Shopping Centre, or to engage in any other acts that are known, or ought to be known, that as a probable and reasonable consequence of which, other persons will engage in an unlawful strike.

7. A copy of the Board's order will be filed in the office of the Supreme Court of Ontario, pursuant to the directions of section 135(3) of the Act.

2836-83-U John Bellenger, Applicant, v. Toronto Motion Picture Projectionists' Union, Local 173 of the International Alliance of Theatrical Stage Employees and Moving Picture Operators of the United States and Canada, Respondent, v. Chuck Morrow, Employee

Duty of Fair Referral — Unfair Labour Practice — Union deciding in advance to post complainant's job for bidding if complainant not returning on time after leave of absence — Decision not communicated to complainant and no opportunity given to explain delay — Whether refusal to extend leave of absence and filling complainant's position with new bid within scope of referral duty — Board finding union conduct arbitrary

BEFORE: Robert D. Howe, Acting Chairman.

APPEARANCES: *John Douglas Bellenger for the applicant; Larry Steinberg, Graydon Hulse and Phil Ristow for the respondent; Chuck Morrow for the employee.*

DECISION OF THE BOARD; August 16, 1984

1. The name of the respondent is amended to "Toronto Motion Picture Projectionists' Union, Local 173 of the International Alliance of Theatrical Stage Employees and Moving Picture Operators of the United States and Canada."

2. This is a complaint under section 89 of the *Labour Relations Act* in which the complainant alleges that he has been dealt with by the respondent contrary to sections 68 and 69 of the Act.

3. The complainant has been a member of the respondent trade union (also referred to in this decision as the "Union") for approximately 17 years. In or about 1979 the complainant bid on and obtained a position as projectionist at the Imperial Six Theatre (the "Theatre") in Toronto. That position was a particularly desirable one due to its location and its remuneration of approximately \$40,000 per year. The Theatre is operated by Famous Players Limited (the "Employer") and is covered by a (December 31, 1981 to January 2, 1985) collective agreement between the Union and the Employer. That agreement provides, in part, as follows:

1. The EMPLOYER agrees to employ only moving picture machine operators supplied by the UNION (Local 173).

2. (a) The EMPLOYER agrees to employ and keep in employment only members of the UNION who are in good standing.

(b) The UNION agrees to furnish persons competent to perform work as required by the EMPLOYER under the provisions of this Collective Agreement.

In fulfilling obligations such as those under Article 2(b), the Union's responsibilities include referring members to employment and granting leaves of absence to members. Prior to the summer of 1981, most requests by members for leaves of absence were handled by Graydon Hulse, who has been the Union's Business Manager for over fifteen years. If relief personnel were available, Mr. Hulse generally granted requests for leaves of absence and for extensions of such leaves, although he would refer to the Union's Executive Board requests involving extended leaves of absence. That system worked fairly well until the summer of 1981 when many theatres extended their hours of operation by adding matinees and supper shows. This resulted in there being insufficient relief personnel available to cover for all of the members who wished to take summer vacations. The situation was exacerbated by the fact that some relief personnel were occupied on a full-time basis filling in for members who were away on leaves of absence. This situation prompted the membership to amend the Union's by-laws in early 1982 by adding the following leave of absence provisions:

Leave of Absence shall not be for longer than 3 months. Such request shall be made to the Business Manager who shall be empowered to grant or deny any request, according to manpower conditions at the time.

Any request for more than 3 months, or any extension of a granted 3 months leave of absence, shall be made to the Executive Board.

The Executive Board shall be empowered to grant or deny any such request.

4. The complainant is an avid sailor. During his seventeen years of membership in the Union, he has taken a number of travelling holidays, including four voyages to Nova Scotia, a sail along the St. Lawrence River and a three month trip to Australia. He returned to work on time from each of those holidays with the exception of his 1981 voyage to Nova Scotia, from which he returned about a month late because he encountered serious problems in having his vessel berthed for the winter. The complainant appeared before the Executive Board upon his return and was reprimanded and fined \$25 for that incident.

5. In the spring of 1983 the complainant applied to the Executive Board for a five month leave of absence which, when added to his accrued vacation credits of one month, would give him six months to sail his boat across the Atlantic. Since many members of the Union were unemployed and, therefore, available for relief work, the complainant thought that his application for such leave would be a "popular move" in that it would permit another member of the Union to earn approximately \$20,000 in his absence. Thus, he was somewhat perplexed when the Executive Board deliberated for approximately half an hour before approving his request. However, the evidence indicates that the Executive Board does not automatically approve such requests and has in fact denied leaves of absence in the past where members wished to obtain such leaves in order to accept other employment opportunities. Moreover, they had not yet been apprised of the theatres' summer operating plans, which could involve extended hours of operation requiring the services of many relief persons, one of whom would have only limited

availability if the complainant's leave was granted. Nevertheless, after discussing those concerns in the complainant's presence, the Executive Board voted to grant the requested leave of absence. There was no discussion at that meeting of what would happen in the event that the complainant did not return from his leave of absence on time, although some concern was raised about that possibility.

6. The Union fills vacancies in "permanent steady jobs" (such as the complainant's position at the Theatre) by posting them for a minimum of seven days, after which members bid on them on the basis of seniority at the next regular Union membership meeting. When a member who holds such a position is absent due to illness or leave of absence, his position is filled by relief personnel, who are assigned to such jobs by the Union on the basis of availability.

7. The Union Executive Board regularly meets on the last Wednesday of each month in preparation for the general membership meeting which is held during the first week of each month. At the Executive Board meeting held during the last week of December of 1983, someone brought up the fact that it was getting close to the end of the complainant's leave of absence and that he had not yet returned. His late return in 1981 was also mentioned in that discussion which culminated in a decision to recommend to the membership that the complainant's job be declared open and be posted for bid by the membership if he did not return on time. Despite the fact that the complainant had provided the Union with a forwarding address, no effort was made to inform the complainant that the Executive Board had decided to recommend this course of action to the membership. Had a letter to this effect been sent to the forwarding address, the complainant might well have been made aware of its contents as he had made arrangements to have all of his mail opened during his absence. The only explanation provided for this failure to make any attempt to notify the complainant was that Union officials "assumed" that a letter sent to the forwarding address provided to the Union by the complainant would not come to the complainant's attention. When asked why the Executive Board dealt with the matter in December, before the complainant's leave had actually expired, rather than at the January Executive Board meeting which was to be held after the date on which the complainant was supposed to return to work, Phil Ristow, the President of the Union, replied, "I think we were just planning."

8. As noted above, the complainant was supposed to return to work on January 7, 1984, as the final day of his leave of absence was January 6, 1984. The voyage proceeded as planned until the complainant and his crew reached Portugal, where they were delayed for a full month by stormy weather. After that storm finally dissipated, they sailed to the Canary Islands where they "struck calms" which delayed them for a further two weeks. During that period, the complainant wrote the following letter and sent it by air mail to the Union (care of the Union's Recording Secretary):

Les Palmas
Canary Islands
Dec. 18th '83

To the board
Local 173
Toronto.

Men!

Here we are — far from home — trapped (with about 150 other yachts) because the trade winds are late — indeed — are blowing the wrong way!!

This freak condition is wide spread — and is caused (I think) by the “Azores high”, having moved about 1000 miles to the south of its normal position. Now it seems to have moved back to its normal place & we all expect to be on our way soon. (the whole *fleet* of us!)

It takes about 3 weeks to a month of non stop sailing at least.

So — although I have done my best — getting to here, things are beyond my control. So would you please consider extending my leave what ever few weeks are needed?

Weather here is pleasant but calm. There are (we hear) 18 yachts waiting in Gibraltar & 27 in Tangier — How many in all the other ports can only be guessed at!

We are a part of this whole thing. Hope that you do not think that it is a lack of concern on my part. I'm concerned. I'm doing my best though to put into practice, the old saying, “when rape is inevitable — you may as well lay back & enjoy it”. So here we are!

Cheers — all the best

John Bellenger

In his testimony before the Board, the complainant observed that that letter was “written in a holiday mood”, and noted that while the reasons in the letter are accurate, they “would have been made fuller in person”.

9. That letter was not received by the Union until January 2, 1984. It was read out at the Union (general membership) meeting on January 3 by Mr. Hulse at the time that the Executive Board's aforementioned recommendation with respect to the complainant was raised for discussion. Mr. Hulse advised the membership that the Executive Board had not had the benefit of the complainant's letter during their discussion of the matter, and requested them to “judge the case with that in mind”. Following a brief discussion of the matter, the majority voted in favour of posting the complainant's job in the event that he failed to return on time from his leave of absence. It is clear from the evidence that Executive Board recommendations are generally, although not invariably, accepted by the membership.

10. The Union also made no attempt to communicate that decision to the complainant who, not unreasonably, assumed that the requested extension of his leave of absence would be granted as there were a substantial number of unemployed and under-employed members of the Union available for relief work. Thus, the complainant was unaware that his job was in jeopardy until early February when his girlfriend, who became aware of the situation through word of mouth, placed an urgent telephone call to him in Barbados. When he returned her call she apprised him of the motion which had been passed at the January 3rd Union meeting. At that point the complainant was unable to leave Barbados because he had already contracted to pay \$500 for a crane to remove his boat from the water. He also had to make arrangements

to get passage for each of his crew members, as under Barbadian law the captain of a vessel is responsible for getting each of his crew members off the island. Moreover, all flights from the island were booked to capacity and the complainant was unable to get a flight out until February 10th. Since it was impossible for him to return to Toronto in time for the February 7th Union meeting, he sent the following telegram to Mr. Hulse on February 4, 1984:

URGENT AND IMPORTANT REQUEST OPPORTUNITY TO DEFEND POSITION PLEASE DEFER ANY ACTION TILL NEXT MEETING BARBADOS AIR TRAFFIC AT PEAK CRUCIAL TO STORE BOAT FRIDAY NITE SOONEST POSSIBLE.

JOHN BELLENGER

11. In addition to that telegram, Mr. Hulse received a letter from the Employer's Personnel Director, indicating that the complainant was a very good employee and requesting that he be permitted to retain his position at the Theatre. Those communications, together with the complainant's letter of December 18, 1983, caused Mr. Hulse to conclude that it would be in the best interest of everyone concerned for the complainant's job to continue to be performed by a relief person until the complainant returned to Toronto.

12. At the next regularly scheduled Union meeting, which took place on February 7th, Mr. Hulse read to the membership the complainant's telegram, the letter from the Employer's Personnel Director, and the complainant's letter of December 18th. Mr. Hulse also advised the membership that he was of the opinion that the motion passed at the January meeting should be rescinded and that the complainant's job should continue to be covered by a relief person. However, that view was not shared by some of the members of the Executive Board, who noted that it was the second time that the complainant had not returned on time from a sailing trip, and expressed their disfavour concerning the Employer's letter on the basis that the Employer should not be permitted to usurp the Union's power to control the allocation of jobs. During the ensuing debate, which lasted for approximately 45 minutes, some members spoke in favour of Mr. Hulse's proposal, while others opposed it. When the matter was put to a vote, 39 persons voted in favour of rescinding the original motion, while only 21 voted against doing so. However, that substantial majority was insufficient to rescind the January motion because under the applicable rules of order ("Roberts Rules of Order Newly Revised", as specified in Article XXII of the Union's Constitution) a majority of two-thirds was required to rescind the previous motion.

13. After the motion to rescind the previous motion failed to pass, the job in question was bid upon by members on the basis of their seniority. The successful bidder was Chuck Morrow, who testified that he attended the February Union meeting for the specific purpose of using his seniority to bid on the complainant's position at the Theatre. Mr. Morrow also noted that the job which he left in order to assume that position at the Theatre has since been filled by another person. It was his evidence that since the time at which he successfully bid on the complainant's position, there have been three other jobs posted on which he was unable to bid because the bidding rules only permit him to use his seniority to bid on a job once a year.

14. After the complainant arrived back in Toronto on February 10th, he contacted Mr. Hulse, who confirmed that his job had been posted and awarded to Mr. Morrow, and expressed his personal sympathy to the complainant concerning the situation. The complainant attended

the February Executive Board meeting and submitted that his job should not have been posted since his return from his leave of absence was unavoidably delayed by circumstances beyond his control. However, the Executive Board defended the action of the membership and indicated that it was "entirely out of their hands". During the discussion of the matter, Mr. Ristow told the complainant that it was "crucial that the [Employer] not win the case" as the Union "wasn't going to be pushed around by Famous Players". After failing to obtain satisfaction at that meeting, the complainant considered taking his case to the membership but decided, in consultation with Mr. Hulse, that such action would be unlikely to result in his being restored to his former position, in view of the fact that a two-thirds majority would be required, and in view of the fact that Mr. Morrow had assumed the position. Accordingly, the complainant decided to file a complaint with this Board for determination under section 89 of the Act.

15. The complainant submitted that the Union has dealt with him contrary to sections 68 and 69 by arbitrarily refusing to extend his leave of absence and by posting his job for seniority bid without first giving him an adequate opportunity to explain his lateness. He also complained that the letter from the Employer had been "twisted around" and used to prejudice rather than support his case.

16. Counsel for the respondent submitted that his client has contravened neither section 68 nor 69. He noted that section 68 only imposes a duty on a trade union with respect to its representation of employees in the bargaining unit vis-a-vis their employer. Although he conceded that the respondent is the kind of trade union to which section 69 applies in respect of the manner in which it refers people to work, he argued that the respondent's refusal to extend the complainant's leave of absence was merely incidental to that function and did not attract the section 69 duty. Counsel also submitted, in the alternative, that there was no evidence of discrimination, bad faith or arbitrariness on the part of the respondent.

17. I agree with counsel for the respondent that the complainant has not established a contravention of section 68 of the Act. However, notwithstanding counsel for the respondent's very able argument to the contrary, I am satisfied that there has been a contravention of section 69 of the Act by the respondent. That section provides as follows:

Where, pursuant to a collective agreement, a trade union is engaged in the selection, referral, assignment, designation or scheduling of persons to employment, it shall not act in a manner that is arbitrary, discriminatory or in bad faith.

The Board has already considered and rejected the contention that section 69 addresses only the acts or omissions of a trade union in the actual selecting, referring, assigning, designating or scheduling of persons to employment. In *Maurice Berlingette*, [1984] OLRB Rep. April 586, counsel for Local 1036 of the Labourers' International Union of North America argued that an arbitrary, discriminatory or bad faith refusal by a union to give a member information about referral records could not itself be a violation of section 69, because such refusal did not involve the actual selecting, referring, assigning, designating or scheduling of persons to employment. In rejecting that submission, the Board wrote, in part, as follows:

13. The phrase "engaged in the selection, referral, assignment, designation or scheduling of persons to employment" describes the sort of trade union to which section 69 applies. The section says that that sort of trade union "shall not act in a manner that is arbitrary, discriminatory or

in bad faith". If the Legislature had meant "act" to refer only to the "selection, referral, assignment, designation or scheduling of persons to employment", it could have employed the words "so act" or "do so" in place of "act" or otherwise made the limitation clear. To what acts does the duty apply, then? It might be argued that a failure to connect the word "act" with the actions enumerated in identifying the actor will cast the word's meaning adrift, allowing it to focus on anything from union politics to the union's dealings with those who supply its pencils and paper. The section's historical antecedents, however, both favour the broader interpretation and make sense of its limits. Those antecedents include section 68 of the Act, this Board's decision in *Arthur Joseph Roberts*, [1974] OLRB Rep. March 169, and the *Report of the Royal Commission on Certain Sectors of the Building Industry* in December, 1974 (the "Waisberg Report").

14. . . . Section 68 of the Act provides:

A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

The origins of the section and the principles which guide its application are the subject of extensive Board jurisprudence and scholarly analysis (see, for example *Ontario Hydro* [1975] OLRB Rep. May 444; *Savage Shoes Ltd.* [1983] OLRB Rep. Dec. 2067; Raymond E. Brown, "The 'Arbitrary', 'Discriminatory' and 'Bad Faith' Tests Under the Duty of Fair Representation in Ontario", (1982) 60 Can. Bar. Rev. 412; and Richard M. Brown, "Toward a General Theory of Fair Representation in Contract Administration" in Swan & Swinton, *Studies in Labour Law* (1983, Butterworths) at page 177). A detailed exploration of those matters will not be repeated here. It is sufficient to note that the "duty of fair representation", which evolves by necessary implication from the restraints of section 68, speaks to a trade union's behaviour as agent for employees in dealings with their employer. A union's conduct of its own business and internal proceedings become the focus of section 68 only if and to the extent that they affect the representation of the individuals in matters involving their employment. In March 1974, this Board concluded in *Arthur Joseph Roberts*, *supra*, that the language of section 68 was ineffective to extend these duties to a relationship between a union operating a hiring hall and its unemployed members:

17. Would the Board therefore be on a sound footing in granting relief to persons who are not employees for purposes of section 60 of the Act? In this regard the Board has come to the conclusion that it would do violence to the intent of the Legislature if it presumed that members of a trade union affected by a union hiring hall are "employees in a bargaining unit" for purposes of supervising the operation of that hiring hall through the union's alleged duty of fair representation.

18. We are satisfied that it was the intention of the Legislation to restrict the scope of a trade union's duty of fair representation to employees in a bargaining unit. It would be a forced interpretation of the word employee in section 60 for the Board to presume the contrary where the Legislature permits parties to the collective bargaining relationship under section 39(1)(a) of the Act to determine through negotiation the very conditions upon which the employer-employee relationship may be established. It is the Board's opinion that if the Legislature intended the scope of the trade union's duty of fair representation to extend beyond employees in the bargaining unit it would have done so in the clearest of language. The Legislature has given the Board a clear mandate with respect to granting relief against discriminatory hiring practices based on trade union activity. It has not done so for purposes of section 60.



20. The Board holds that under section 60 a trade union's duty of fair representation does not extend to members in good standing who are not employees in a bargaining unit.

In December, 1974, His Honour Judge Waisberg expressed concern at this result, and discussed the need of members for access to hiring hall records (*The Waisberg Report, supra*, at pp/ 327-328):

In the construction industry the employees do not enjoy the security of employment that is found in other industries. The only permanent relationship is that established with the union. It is understandable that the unions would wish to provide their members with a system of hiring that would provide maximum job security. But privileges and obligations go together. The only opportunity for a tradesman to find work might be through his respective union and hiring hall: if a work application by a qualified tradesman is not accepted, that tradesman is denied his right to work. Section 38 [now 46] of the *Labour Relations Act* provides some protection for employees, and section 60 [now 68] provides for fair representation of employees by the union. But what about the person who is still seeking to become an employee? In a case before the Ontario Labour Relations Board, *A. J. Roberts and Plasterers Union Local 49* (File No. 4715-73-U, dated 20 March 1974), it was held that the scope of a trade union's duty of fair representation was restricted to employees in a bargaining unit. Equally, the opportunity for an employer to find workmen would be through the union and hiring hall. There must be some assurance that he will be treated fairly. I do not feel that a case has been made for removing the hiring hall from union control. But in view of the fact that the operation of hiring halls by unions with closed shop collective agreements places them in a position of complete monopoly, it would seem to me that some form of public inspection would be justified. The records should at all times, be available to the union members, the employers and the inspectors. There was a favourable response by a few unions appearing before the Commission to some degree of public

supervision. It may prove sufficient in correcting some of the abuses. Further investigation and consideration are warranted.

Section 60a, now section 69, was then enacted by the Legislature, and came into effect July 18, 1975 (s.o. 1975, c. 76, s. 16). All this preceded the broader purposive interpretation later given to "employee" in hiring hall situations by the Ontario Court of Appeal in *Re Blouin Drywall Contractors Ltd. and United Brotherhood of Carpenters and Joiners of America, Local 2486*, (1975) 8 O.R. (2d) 103, and the Supreme Court of Canada in *International Longshoremen's Association et al. v. Maritime Employers' Association et al.*, [1979] 1 S.C.R. 120. . . .

15. The language and history of section 69 suggest that the actions with which that section is concerned must be actions analogous (at least so far as the analogy can be drawn) with the actions to which section 68 is directed: actions in matters affecting the employment of persons the union represents. The duty will have different elements and will apply to different sorts of actions, however. The kind of union to which section 69 applies has a much greater control over the employment of the persons to whom the duty is owed and the employment relationships which result from the operation of a hiring hall are often very different from those in respect of which the section 68 duty usually applies. . . .

18. In the present case, Union counsel sought to categorize his client's conduct as a mere refusal of an extension of a leave of absence, which he contended to be an internal Union matter beyond the scope of section 69. However, that refusal is in my view inextricably interwoven with the Union's decision to post the complainant's job for seniority bid and, as a result, to refer Chuck Morrow instead of the complainant to the job in question. I agree with counsel for the respondent that there is no evidence of discrimination or bad faith on the part of the respondent or any of its officials. However, the same cannot be said with respect to arbitrariness. Having carefully considered the matter, I have concluded that the complainant has established on the balance of probabilities that the respondent contravened section 69 of the Act in the circumstances of this case by acting in a manner that is arbitrary. That arbitrariness commenced with the action of the Union Executive Board in deciding to recommend that the complainant's job be posted if he did not return to work by January 7th. The decision to recommend that relatively harsh course of action was made in December before the complainant's leave had expired, and was made without any consideration of the variety of legitimate reasons that an individual might be late in returning from a leave of absence, such as illness, accident, adverse climatic conditions, and other circumstances beyond human control. No effort whatsoever was made to communicate to the complainant the Executive Board's decision to recommend that course of action, the severity of which can best be appreciated by contrasting it with the reprimand and \$25 fine which the complainant received when he returned a month late in 1981. Even after the Union had received the complainant's letter of December 18, 1983 describing the adverse climatic conditions which precluded him from completing his voyage on schedule, the Executive Board proceeded undaunted with its recommendation. Thus, the Executive Board encouraged the membership to vote in favour of depriving the complainant of his highly valued position at the Theatre without providing the complainant with any indication that they intended to do so, and without providing him an opportunity to argue against such action by detailing the reasons for his lateness, the legitimacy of which was not disputed at the hearing of this matter. No satisfactory reason was advanced as to why it was necessary or appropriate

for that action to be taken in such a precipitate fashion before the complainant had a reasonable opportunity to explain the reasons for his lateness and, indeed, before the complainant was even late. By encouraging the adoption of that motion at that time, the respondent's Executive Board created a situation in which to restore the situation which existed prior to that motion, the complainant would have to muster the support of a two-third's majority of those in attendance at a subsequent membership meeting. Thus, when the complainant ultimately became aware of the respondent's action and sent an urgent telegram requesting an opportunity to defend his position, the fact that 65 per cent of the members in attendance at the February meeting supported this eminently reasonable request was insufficient to prevent the complainant's position from being placed on the floor for bid. This arbitrary result flowed directly and foreseeably from the arbitrary procedure adopted by the respondent in respect of the complainant. (Under the circumstances it is unnecessary to comment on the manner in which the Employer's letter was presented to the membership.)

19. For the foregoing reasons, the Board finds and hereby declares that the respondent contravened section 69 of the *Labour Relations Act* in the manner described above.

20. During the course of the hearing of this matter, the parties expressed agreement that if the Board determined that the respondent had contravened the Act, the parties should be given an opportunity to attempt to agree upon appropriate redress for the complainant. Having regard to that agreement, the Board will remain seized of this matter for remedial purposes. In the event that the parties are unable to reach agreement on that aspect of the complaint, the matter will be scheduled for continuation of hearing at the request of the complainant or the respondent.

0921-84-U Burns Meats Ltd., Complainant, v. United Food and Commercial Workers International Union and the United Food and Commercial Workers International Union, Local 139, Respondents

Duty to Bargain in Good Faith — Unfair Labour Practice — Longstanding practice of negotiating nationally for national agreement covering employer's six plants — Union refusing employer's demand for local bargaining for single plant in Ontario — Attempt to bargain beyond scope of bargaining rights contrary to scheme of Act — Union taking demand for national bargaining to impasse bargaining in bad faith

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members W. H. Wightman and B. L. Armstrong.

APPEARANCES: *D. Churchill-Smith, Q.C. and J. A. Roffey for the complainant; M. Levinson, B. Fishbein, F. Benn and S. Szuba for the respondents.*

DECISION OF N. B. SATTERFIELD, VICE-CHAIRMAN, AND BOARD MEMBER W. H. WIGHTMAN; August 21, 1984

1. This is a complaint filed under section 89 of the *Labour Relations Act* in which the complainant Burns Meats Ltd. ("the employer") alleges that it has been dealt with contrary to section 15 of the Act by the respondents United Food and Commercial Workers Union ("the International") and United Food and Commercial Workers Union, Local 139 ("Local 139"). Section 15 of the Act provides as follows:

15. The parties shall meet within fifteen days from the giving of the notice or within such further period as the parties agree upon and they shall bargain in good faith and make every reasonable effort to make a collective agreement.

• • •

3. The employer alleges that the International and Local 139 have violated section 15 of the Act as a result of their failure and refusal to negotiate, with respect to the employer's Kitchener plant, a renewal of the expired collective agreement to which the employer, the International and Local 139 were bound unless the negotiations were conducted on a national basis for all of the employer's plants in Canada which had been covered by the expired agreement and unless a master agreement was negotiated for all of these plants.

4. The relief which the employer is seeking for the alleged violation includes, amongst other things, a request that the Board order the respondents to return to the bargaining table forthwith, to bargain in good faith in order to conclude a collective agreement on behalf of the employer's employees at its Kitchener plant without any pre-conditions to collective bargaining, including in particular the alleged pre-condition that the bargaining be conducted on a national basis for a master collective agreement covering all of the employer's plants that were covered by the expired agreement.

5. The Board heard the testimony of Robert A. Wuest, director of industrial relations, Burns Foods Limited and Frank Benn, Director, Region 18 of the International with respect to the bargaining history of the parties and the events leading up to the filing of this complaint. Mr. Wuest was the employer's chief spokesman in the 1982 negotiations with respect to the expired agreement and is its chief spokesman for the current negotiations. He has been an employee of Burns Foods Limited for approximately thirteen years and has held his present job for approximately three years. Mr. Benn was appointed to his present position as the International's senior officer in Canada in September 1983 and has been a member of the International, its predecessors or local unions thereof since 1946. Prior to joining the staff of the predecessor to the International in May 1954, Benn was involved in two rounds of national bargaining for another employer in the meat packing industry in Canada. From May, 1954 until sometime in 1972 he was the International representative for the International in western Ontario, located in Kitchener. During all of that period, but not since then, Benn was involved with national bargaining with respect to the employer. From 1972 until September 1983 he was International director of the International located in Toronto. Benn has been involved in each round of national bargaining in the meat packing industry since 1948. Having weighed and assessed their testimony and their relative credibility, and having considered the submissions of counsel respecting that evidence and the relevant law, the Board makes the findings of fact and law hereafter set out.

6. There has been a form of national bargaining by certain companies in the meat packing industry in Canada since approximately 1950. The national bargaining format involved the employer, Canada Packers Inc., Swift Canadian and Inter-Continental Packers. The bargaining format followed was for each company to conduct its own negotiations with the International and its locals at a single bargaining table. Each company bargaining committee was made up of representatives of the corporation and representatives of the local plants. The union bargaining committee in each case was made up of a representative or representatives of the International and representatives of the locals, usually the president and the chief steward of each local. The chairman of the union bargaining committee was a representative of the International and was referred to as the "chain" chairman. When notice to bargain was given by the union, it was given by the chain chairman to the corporation. According to Benn, the union's practice was to first serve notice on Canada Packers and then on the other companies. When bargaining was taking place, at least with respect to Burns, Canada Packers and Swift, it took place at the same time and in the same city, usually in the same hotel, but at separate bargaining tables. When settlement was reached, the union's ratification process was for each local to conduct its own ratification vote and transmit those results to the chain chairman. The chain chairman would tally the results and an overall majority was required for the settlement to be ratified. A single collective agreement was executed for each company covering all plants of the company for the employees of which the International or one of its locals held bargaining rights. An exception to the single collective agreement existed until 1966 with respect to the Kitchener plant of Burns and Co. (Eastern) Limited. Prior to 1966, that plant had a collective agreement separate from the one covering the other plants of the employer, although both agreements were the product of common negotiations. In 1966 the name of Burns and Co. (Eastern) Limited was no longer used with reference to the Kitchener plant and it became covered by the single agreement to which the employer's other plants were bound. The evidence is not clear whether Inter-Continental at one time bargained in the same cities and at the same time as the other three companies, but some time after the middle 1970's, according to Benn, Inter-Continental conducted its negotiations in Vancouver for its plants which now number only two.

7. Whenever it became necessary for the negotiations to go through conciliation procedures, this was done pursuant to the requirements of the provincial legislation for the provinces in which the plants of the companies were located. Sometimes when it was necessary to mediate a dispute, the mediation services of one province, for example Ontario, were used to satisfy the requirements in all provinces.

8. At the expiry of collective agreements in 1984, only Burns and Canada Packers were covered by master agreements of national application. Swift no longer operates meat packing plants in Canada and its two former plants are owned by separate and apparently unrelated companies. Inter-Continental, which formerly operated four meat packing plants, now only operates two and these are not subject to national bargaining. In 1982, the International agreed with its Vancouver local at the employer's plant that the Vancouver local could bargain separately from the national bargaining. It appears that Burns was not aware of this circumstance until its representatives came to the national bargaining table, but it is common ground that the Vancouver local and plant are not covered by the master agreement which expired May 31st, 1984. Two recently acquired plants of Canada Packers in Ontario are not subject to the national bargaining, although Benn claimed in his testimony that bringing those plants into national bargaining with Canada Packers is an issue in the 1984 negotiations.

9. The employer has been involved in this national bargaining format since 1950 and its Kitchener plant at least since 1956. At that time, as noted above, the Kitchener plant operated under the name of Burns & Co. (Eastern) Limited and had its own agreement. Since 1966 the Kitchener plant has been covered by the master agreement. The most recent collective agreement binding on the employer, the International and Local 139 was the one which was in effect from June 1st, 1982 until May 31, 1984 ("the Agreement"). The Agreement is between:

BURNS MEATS LTD.
CANADIAN DRESSED MEATS
(LETHBRIDGE) LIMITED
hereinafter called "the Company"

-and-

UNITED FOOD AND COMMERCIAL
WORKERS INTERNATIONAL UNION
affiliated with the A.F.L.-C.I.O. and
the Canadian Labour Congress (C.L.C.)
on behalf of its Local Unions
hereinafter named, and herein called
"the Union".

The Agreement contains the following recognition provision:

Recognition

The Company recognizes the Union as the exclusive bargaining agency for its plants as under:

Plant	Bargaining Agency
Kitchener, Ontario	Local 139
Winnipeg, Manitoba	Local 224P
Brandon, Manitoba	Local 224P-B
Edmonton, Alberta	Local 233P
Calgary, Alberta	Local 363
Lethbridge, Alberta	Local 740P

While the Agreement contains at least two references to the responsibilities of the head office of the company and the national office of the union, Article 21 — Application provides as follows with respect to the primary responsibility for its administration:

All parties to this Agreement recognize and agree that in its application at each plant the primary responsibility for interpreting and administering its provisions shall be the duty and obligation of the Local Union and the local plant management.

The duration clause of the agreement provides for either *party* to give notice to the other *party* with respect to renewal or termination of the Agreement.

10. The Agreement is signed on behalf of “the Company” party by W. F. Goetz, Vice-President Human Resources, Burns Foods Limited; W. R. Rees, Vice-President, Operations, Burns Meats Ltd.; R. A. Wuest, Director of Industrial Relations, Burns Foods Limited and for “the Union” party by Romeo Mathieu, Director, Region 18 and G. T. Connolly, International Representative. Benn is the successor to Romeo Mathieu. G. T. Connolly is the representative of the International permanently assigned to administer and supervise the collective bargaining relationship with the employer. The Agreement also provides for it to be signed by the duly authorized officers of each local and by the authorized local superintendent of the employer’s plant “. . . as evidencing their agreement to and concurrence in its terms.”.

11. Informal meetings were held in Toronto on March 6th, 7th and 8th, 1984 between the national bargaining committees of the employer and the union. Wuest presented a written statement to the union on March 6th outlining the company’s intention to bargain a renewal of the Agreement on a local basis with respect to each of its plants which had been covered by the Agreement. The union made it clear that it was opposed to bargaining on any other basis than the national bargaining format. The employer subsequently served notice on Local 139 and the locals of the International at the employer’s other plants covered by the Agreement.

12. The employer’s notice to bargain with respect to Local 139 was given in a letter dated March 16th, 1984 from Mr. B. Higgins, Kitchener plant superintendent, to Steve Szuba, president of Local 139. Julius Hoebink, a business representative of the International, advised Higgins by letter dated March 20th, 1984 that “. . . the members of Local 139, . . . wish to amend the present collective agreement . . .”. Benn told the Board that he advised Hoebink and representatives servicing the other locals at the employer’s plants that they should serve notice to bargain on the employer at each plant so not to miss the deadline for giving notice. Enclosed with Hoebink’s letter were “. . . changes as recommended by the members of Local 139.”. Higgins sent the proposals from the Kitchener plant to Szuba under cover of a hand delivered letter dated March 30th, 1984. The parties met in Kitchener on April 18th. The employer’s bargaining committee was made up of representatives from the corporation and the local plant. The union’s committee was made up of Hoebink and representatives of local 139. Following that meeting, the union applied for conciliation services and a conciliation officer

was appointed. The officer met with the bargaining committees of the parties on May 24th. The company presented amended proposals for settlement of a collective agreement. One of the proposals was to eliminate from the recognition statement and throughout the Agreement any "... reference to any plant other than Burns Meats Ltd., Kitchener...". The parties were subsequently advised effective June 1, 1984 that the Minister of Labour would not appoint a conciliation board. On or about June 13th, a vote was conducted pursuant to section 40 of the Act on the employer's offer respecting the Kitchener Plant made at the May 24th meeting with the conciliation officer. The offer was rejected. Benn recommended that the offer be rejected on grounds which included what he termed to be the employer's departure from its obligation to bargain nationally. A strike began at 7:00 p.m. on Sunday, June 17th. In a letter dated June 28th from Higgins to Szuba, the employer proposed "... that the parties return to the bargaining table as soon as possible to conclude a viable collective agreement.". A meeting was held on July 3rd, but the result was no different than the two earlier meetings between the parties and as of the last date of hearing into this complaint on Tuesday, July 31st, the strike at the Kitchener plant was continuing.

13. Mr. Connolly, the International's representative who would be the chain chairman for national bargaining with respect to the employer, did not attend any of the meetings in Kitchener. It is clear from Benn's evidence in cross-examination that Connolly did not attend because Benn advised him it would be a waste of time and money in view of the employer's position that it wanted to bargain locally. It is equally clear from Benn's evidence in cross-examination that the International is not prepared to negotiate locally with respect to the employer's Kitchener plant. It was obvious to the parties at the March meetings that the issue of the bargaining format had been joined. The employer intended to bargain on a local basis with respect to Kitchener and the International was opposed to bargaining except on a national basis for a master agreement. Their opposing positions have not altered since then.

14. At the April 18th meeting, the employer spokesman made it clear that the company was prepared to negotiate for a renewal of the Agreement with respect to the Kitchener plant. The union's bargaining committee took the position it would only bargain for the Kitchener plant in the context of master negotiations for all plants covered by the Agreement. This was the unanimous position of the members of the union's committee. The employer's spokesman read its proposals to the union committee, but the union would not address those proposals and stated that it was prepared to bargain only on the basis of national bargaining for a master agreement for all of the employer's plants. The union took the same position at the May 24th meeting in the presence of the conciliation officer when both parties were together. At the July 3rd meeting, the company's representatives again advised the members of the union's bargaining committee that the company was prepared to negotiate an agreement for the Kitchener plant. The meeting ended after the employer twice failed to convince the union to consider its proposals and the union representatives continued to state that they would bargain only on a national basis.

15. The reason contended by the employer for wanting to bargain on a local basis is that its Kitchener plant competes in a local or a regional market and several of its competitors enjoy lower rates of wages and benefits. Three of those competitors are represented by the International and are not part of any national bargaining format.

16. Whether the history of the bargaining relationship between the parties to this complaint is measured from the start of national bargaining in or about 1950 or from 1966 when the Kitchener plant became bound to the same, single collective agreement as the employer's

other plants, it is a long-established and mature relationship. They, together with the plants and local unions which were bound by the Agreement have developed over more than 30 years an inter-provincial bargaining relationship. In the process, they have developed also the institutional foundation and framework upon and within which the relationship has functioned.

17. Moreover, the relationship has functioned without any statutory foundation, or perhaps more aptly, in spite of there being no statutory foundation for it. Labour relations in the meat packing industry are not subject to the jurisdiction of Parliament. The industry's labour relations come within the jurisdiction of each province within which the industry, or more particularly, the employer herein operates. In spite of periodic policy announcements, primarily from the Government of Canada, in favour of various forms of wide area bargaining as a means of stabilizing collective bargaining, there is no enabling legislation to provide a statutory basis for inter-provincial bargaining in the meat packing industry. In fact, excluding the construction industry, the concept of wide area or multi-party bargaining in Ontario remains based on voluntarism. The concept is given some support by section 51 of the Act which gives binding effect to collective agreements which arise out of multi-employer collective bargaining, but not to the bargaining relationship itself. See for example the Board's decision in *Bruce Henderson Limited*, [1977] OLRB Rep. 480, at paragraphs 6 and 7.

18. The employer and the International are under no illusions that their collective bargaining does not come under provincial labour relations legislation. This is evident from how the parties dealt with conciliation and mediation when it became necessary to resort to those processes and from Benn's evidence about his reluctant instructions that 1984 notices to bargain for the employer's plants be given locally so not to miss out on time limits. His instructions were calculated to preserve, at least for the respondents, the option of resorting to a strike which would be lawful under the Ontario Act.

19. Absent a statutory foundation for the inter-provincial aspect of the parties' bargaining relationship, it has had to function over the 30 years on the strength of a voluntary arrangement. Now the employer is insisting on altering the relationship and the respondents are insisting on maintaining it. Whether their defense of the bargaining relationship which has existed until 1984 contravenes section 15 of the Act is the issue which this complaint raises for determination by the Board.

20. While the history of the bargaining relationship between the parties is a proper factual basis against which to view the conduct of the parties in assessing whether there has been a violation of section 15, their conduct must also be viewed and assessed within the framework of the *Labour Relations Act*. The scheme of collective bargaining facilitated and protected by the Act is founded on the concept of a unit of employees represented in collective bargaining by a trade union as the exclusive bargaining agent. The concept was discussed in the following terms in the Board's decision in *Bermay Corporation Limited*, [1980] OLRB Rep. Feb. 166, at paragraphs 35 and 36:

35. . . . Bargaining rights under *The Labour Relations Act* have two incontrovertible attributes. Firstly, they apply to a bargaining unit rather than to individuals, and, secondly, they are exclusive. *The Labour Relations Act* contemplates that employees will be grouped, accordingly to their jobs, into an aggregation of job classifications — the bargaining unit — that, once established, is indivisible for purposes of collective bargaining. An employee may be a member of more than one union, but when he works for a given

employer he is exclusively represented by the union that holds the bargaining rights for the job classification in which he is employed. The employees within the unit bargain with one voice through one union toward one collective agreement by which they and their employer will be bound.

36. That is not to say that the bargaining unit is immutable. By an order of the Board or by the agreement of the parties a bargaining unit may be altered in its job composition. It may also increase or decrease in size. For example, when an employer with a unionized plant within a given municipality opens a second plant in the same municipality and a union holds the bargaining rights for all employees of that employer within the municipality, there is a resulting accretion to the bargaining unit. The recognition clause in the collective agreement governs and the second plant falls within the bargaining unit by the operation of the private law of the parties. The same would be true if municipality-wide bargaining rights are held under a Board certificate, prior to the making of a collective agreement. There the accretion to the bargaining unit occurs by the operation of the Act. Always the critical starting point for collective bargaining is the bargaining unit — a collectivity which may increase or decrease in size, but all of whose members occupy job classifications that give them a common industrial relations interest in consequence of which they are exclusively represented by a single trade union under the Act. Together they choose their bargaining agent and through it they bargain with their employer, strike or are locked out, and finally make and live by a collective agreement.

21. As the Board pointed out in that decision . . . the critical starting point for collective bargaining is the bargaining unit The bargaining unit is the starting point from which a trade union begins to acquire bargaining rights by applying under section 5(1) of the Act for the right to represent employees in a unit which it claims to be appropriate for collective bargaining. Section 6(1) mandates the Board to determine the unit of employees that is appropriate for collective bargaining. The Act is replete with references to the term bargaining unit from the sections dealing with the acquisition of those rights, through the sections dealing with the enforcement of those rights, the transfer of bargaining rights to a successor trade union, the preservation of bargaining rights in the sale of a business, the duty of an exclusive bargaining agent to fairly represent the employees for whom it holds bargaining rights and the termination of bargaining rights.

22. As the Board observed in the *Bermay* decision, *supra*, a bargaining unit is a unit of employees to which a trade union's exclusive bargaining rights apply. In that decision the Board recognized also that a bargaining unit may increase or decrease in size by evolution, or its scope may be altered by, *inter alia*, the agreement of the parties. The maximum geographic size or scope of a unit, however, would be circumscribed to the Province of Ontario by the *Labour Relations Act*. The Act can reach no further than that as a consequence of the constitutional framework under which the statutory regulation of collective bargaining operates in Canada. For example, how could the Board enforce pursuant to section 50 of the Act the binding effect of a collective agreement ". . . upon the employer and upon the trade union that is a party to the agreement . . . and upon the employees in the bargaining unit defined in the agreement." beyond the Province of Ontario? In the absence of any enabling statute or reciprocal arrangement with other provinces, the Board has no jurisdiction to enforce section 50 or other provisions of the Act beyond Ontario.

23. If the bargaining unit is the critical starting point of collective bargaining, what is that point for the parties to this complaint? To put it another way, what is the bargaining unit of the employer's employees for which the International or Local 139 has exclusive bargaining rights? Whatever it is, it is the grouping of the employer's employees in respect of which the parties to this complaint have a common duty under section 15 of the Act to "... bargain in good faith and make every reasonable effort to make a collective agreement."

24. The recognition provision of the Agreement is somewhat ambiguous with respect to whether the Agreement embraces a single bargaining unit formed of all employees of the employer's plants listed therein or whether there are discrete units formed of the employees at each of the employer's plants. For the purpose of this complaint, it is unnecessary for the Board to determine which of those alternative interpretations was intended by the parties. Insofar as the Agreement applies in Ontario, if there is only one bargaining unit in the Agreement it would be circumscribed by the provincial jurisdictional limits of the Act to a unit comprised of all of the employer's employees in the Province of Ontario who were covered by the Agreement. Those are the employees of the Kitchener Plant, so the question of whether the Agreement contains a single unit or several units is academic. For the purpose of this complaint and the Board's jurisdiction under the Act, therefore, the Board finds that the employees of the employer at its Kitchener plant constitute the bargaining unit. It is that unit which defines the legal limits of the bargaining agent's exclusive bargaining rights. It is with respect to the employees in that unit that the employer and the bargaining agent are required to "... bargain in good faith and make every reasonable effort to make a collective agreement." if they are to comply with the legal duty imposed by section 15 of the Act.

25. The collective agreement is ambiguous not only about whether the Agreement embraces one or several bargaining units; it is also ambiguous about where the bargaining rights are held. First the recognition clause provides that the employer recognizes "the Union" as the exclusive bargaining agency for six specified plants. Then it immediately refers to each local union as the respective "bargaining agency" for each plant, with Local 139 identified as the bargaining agency for the Kitchener Plant. The history of the bargaining relationships of the parties to the Agreement clearly indicates that the International has traditionally bargained together with its locals to produce the Agreement. It is equally clear that for the 1984 negotiations respecting the Kitchener Plant, the International and Local 139 acted together in the serving of notices to bargain, the rendering of written proposals and the formulating of positions taken at the negotiating meetings. The issue of which one of them actually holds the bargaining rights was not argued before the Board. However, it is clear from the facts set forth above and from the provisions of the Agreement that the respondents have together engaged in respect of all the acts and omissions which form the subject matter of this complaint and the history which preceded it.

26. In the meetings between the employer and the respondents on April 18th, May 24th and July 3rd, 1984, the respondents on their own behalf and on behalf of the other locals bound by the Agreement, refused to discuss either the employer's proposals or their own unless they were discussed in the context of the national bargaining relationship which had produced the Agreement and with the objective of concluding a single agreement for all of the employer's plants which had been bound by the Agreement. It is hardly surprising, in light of the history of the bargaining relationship between the employer and the constituents of the union party to the Agreement, that the respondents chose to pursue those objectives. Nonetheless they are bargaining objectives respecting employees who are outside of the scope of the exclusive

bargaining rights for the Kitchener Plant employees and beyond the jurisdictional scope of the Act.

27. The scheme of the Act is that collective bargaining shall take place with respect to employees for whom a trade union has the exclusive representational rights in collective bargaining. In order to be in a position to bargain for employees, a trade union must hold bargaining rights under a collective agreement within the meaning of section 1(1)(c) of the Act, a certificate issued to it under the Act or voluntary recognition as contemplated by the Act. It is possible that the International, by one or more of these means, holds bargaining rights for all six of the employer's plants covered by the Agreement. As noted above, it is unnecessary for the purpose of this complaint and the Board's jurisdiction for the Board to determine whether in fact that is the case. Even if the International has the exclusive rights to represent in collective bargaining all of the employer's employees in those plants, the legal limit of those rights with respect to this complaint and the Board's jurisdiction is the Province of Ontario, and hence in this fact situation, the employer's Kitchener plant. What the respondents are seeking to do with their demand that there be a single set of nation-wide negotiations and a single national collective agreement executed respecting all plants which traditionally have been covered by the Agreement, is bargain beyond the legal limits of the exclusive rights attaching to the Kitchener plant. For the respondents to pursue that objective to impasse is inconsistent with the scheme of the Act that bargaining shall be in respect of a bargaining unit of employees for which a trade union has exclusive bargaining rights. In the Board's decision in *United Brotherhood of Carpenters and Joiners of America*, [1978] OLRB Rep. 776, particularly paragraph 18 on page 784, it was because the Board found it inconsistent with the scheme of the Act for the United Brotherhood to pursue to impasse the objective of expanding its exclusive bargaining rights by voluntary recognition on a province-wide basis that the Board found the United Brotherhood in breach of section 15 of the Act. While the specific objectives of the respondents and the United Brotherhood differ, the result is the same; an attempt to bargain beyond the legal scope of their exclusive bargaining rights contrary to the scheme of the Act. In this respect, see also the Board's decision in *Northwest Merchants Ltd. Canada*, [1983] OLRB Rep. July 1138 at paragraph 29. For these reasons, it is inconsistent with the scheme of the Act and unlawful for the respondents to take to impasse their bargaining objective of a single nation-wide set of negotiations and a single national collective agreement.

28. It may well be that the respondents have pursued their impugned course of conduct for the objective of preserving for the Kitchener Plant employees the uniform wages and working conditions which they have in common with employees in the other plants covered by the Agreement. While that objective is not itself illegal, for the reasons set forth above, the means by which the respondents are attempting to achieve it are contrary to the Act. It is not unlawful for a union to bargain for wages and working conditions paralleling those at other plants operated by the employer. The Board's approach to enforcing the section 15 duty has allowed parties to collective bargaining broad freedom to determine the subjects about which they will bargain and the contents of their collective agreements. See *United Brotherhood of Carpenters*, *supra*, paragraph 9, and the authorities referred to therein. That freedom flows from the premise that "... the parties are best able to fashion the law which is to govern the workplace and that the terms of an agreement are most acceptable when the parties who live under them have played the primary role in their enactment." *De Vilbiss (Canada) Ltd.*, [1976] OLRB Rep. Mar. 49. The freedom of parties to fashion the terms of agreements is not without limits, however. For example, it does not extend to being able with impunity to insist upon a demand which would give rise to an illegality (*T. Barlisen & Sons*, [1960] OLRB Rep. May 80); to resort to economic sanctions in pursuit of unlawful or illegal demands (*Croven*

Limited, [1977] OLRB Rep. Mar. 162); or to press to impasse a demand inconsistent with the scheme of the Act (*United Brotherhood of Carpenters, supra*). It is not possible to delineate in the abstract the totality of the limits on that freedom. Any further delineation of the limits must be on a case by case basis in the context of an actual fact situation.

29. It is clear from the facts respecting the meetings between the employer and the respondents on April 18th, May 24th and July 3rd, 1984, the rejection of the employer's last offer and the circumstances surrounding the strike which commenced on June 17th, that a major factor in the strike is the respondents' demand that there be a single set of nation-wide negotiations and a single national collective agreement executed respecting all plants which had been traditionally covered by the Agreement. Thus the respondents have already pursued to impasse a bargaining objective which can be raised and discussed but, for the reasons set forth above, cannot legally be pressed to impasse in the exercise of the exclusive bargaining rights with respect to the Kitchener Plant.

30. Having regard to all of the foregoing and pursuant to section 89(4) of the *Labour Relations Act*, the Board determines, declares and directs that:

- (1) the United Food and Commercial Workers International Union and the United Food and Commercial Workers International Union, Local 139 ("the respondents"), by refusing to bargain respecting the employer's and their own proposals unless there be national bargaining and a single collective agreement covering Alberta, Manitoba and Ontario, and by carrying those conditions to impasse, have contravened section 15 of the Act;
- (2) the respondents cease and desist from their violation of section 15 of the *Labour Relations Act*; and
- (3) the respondents return forthwith to the bargaining table and bargain in good faith for a lawful collective agreement which would cover the Kitchener Plant of the complainant Burns Meats Ltd.

DECISION OF BOARD MEMBER BROMLEY L. ARMSTRONG;

1. This proceeding is but another example of an employer taking advantage of the current economic recession to undermine what had been a stable collective bargaining structure that had been in place for over 30 years. It is unfortunate that the complainant in this case seeks to revert to its strict legal rights by demanding that the union bargain with it on a local basis. Whatever gains the complainant may have achieved in the short term by destroying a national bargaining structure must be measured against the long term effect of fragmenting collective bargaining with its employees and attempting to weaken the union's bargaining position. A deteriorating relationship with the complainant's employees and their union can only hurt the employer. In my opinion, the complainant would have been better advised to recognize that the national bargaining structure was only voluntary, but that in the interests of good labour relations, it would continue to bargain with the union on a national basis.

2. I am in agreement with the factual and legal analysis of the majority, but dissent from providing any remedy to the complainant. A national bargaining structure in industries subject to provincial jurisdiction cannot be imposed or continued against the wishes of either

party to that structure. The fact remains, however, that such broad based national bargaining does provide for labour relations stability by reducing the number of separate collective bargaining situations, and by limiting the potential for conflict in a large and important industry to a narrow period of time. While this Board cannot compel the continuation of such a bargaining format, I believe that the Board should not condone a party unilaterally withdrawing from national bargaining. I believe that the Board could, in the exercise of its discretion, refuse to issue any remedy in respect of what is, to my mind, a technical violation of the Act.

3. It is clear that the union cannot force this employer to sit at one table and bargain in respect of all of its plants in Canada. However, there is nothing wrong in the union establishing national bargaining objectives, and engaging in separate bargaining to achieve those same objectives throughout the country. Although the bargaining would be carried out in respect of each local, common bargaining objectives and taking the necessary steps to establish the same dates for economic sanctions if those objectives are not met could, from the union's point of view accomplish the results sought through national bargaining. Of course, this approach would be more complicated and would require the affected local unions and their members to maintain the discipline necessary to achieve the desired results.

4. In my opinion, the employer may have succeeded in destroying the formal national bargaining structure in the meat packing industry, but it cannot prevent the union from taking the appropriate internal steps to attempt to bargain, and if necessary, strike for common goals. For all of these reasons, I would have reluctantly found a technical violation of the Act, but would have refused, in the exercise of the Board's discretion, to grant any relief to the complainant in this case.

0274-84-U;0275-84-R London & District Service Workers' Union, Local 220, Complainant, v. Caressant Care Nursing Home of Canada Limited, Price Waterhouse Limited, The Canadian Imperial Bank of Commerce, Romi Nursing Home Ltd., The Ministry of Health for Ontario, Paul Gould, Randy Read, and Allan Dyer, Respondents; London & District Service Workers' Union, Local 220, Applicant, v. **Caressant Care Nursing Home of Canada Limited**, Respondent, v. Price Waterhouse Limited, Intervener #1, v. The Ministry of Health, Intervener #2

Employer — Interference in Trade Unions — Sale of a Business — Unfair Labour Practice — Whether surrender of nursing home licence by insolvent employer and acquisition of same by respondent constituting sale — Whether arrangement for purchaser to manage operation until transfer completed by itself of a sale — Purchaser's existing non-union operations not accretion to bargaining unit — Employees of union business purchased intermingled with employees of existing non-union operation — Vote directed among all employees where two groups in equal numbers

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members J. Murray and L. Collins.

APPEARANCES: *David Starkman, Randy Levinson, Paul Middleton, Helen North, Marylou Kleinhaar and Marie Dubyk for the applicant/complainant; Donald J. McKillop, Q.C., James P. Lavelle and Gerald McKerral for Caressant Care; Garth MacDonald for Price Waterhouse and The Canadian Imperial Bank of Commerce; no one for Romi Nursing Home; Leslie M. McIntosh for the Ministry of Health, Paul Gould, Randy Read, and Allan Dyer.*

DECISION OF THE BOARD; August 27, 1984

1. This case involved two matters heard together by the Board, one being an application for a declaration of "successor employer" under section 63 of the *Labour Relations Act*, the other being a complaint under section 89 of the Act. While the respondents in both were not the same, the facts essential to both were substantially the same, and the two files were dealt with procedurally at the hearing as one. The Board will now issue one decision dealing with both matters as well.

2. The background to these matters is set out in an earlier decision of the Board (reported [1983] OLRB Rep. Oct. 1706) involving an application by the present applicant for a declaration that Price Waterhouse Limited and Canadian Imperial Bank of Commerce were either "successor" or "related employers" at that point. The "business" which was the focus of that, and this, application is a Nursing Home in the City of St. Thomas initially owned and operated by a company called Willson Nursing Homes Limited, under the name "Willson Nursing Home". None of the respondents herein challenged the preliminary facts found by the Board in the prior application, and these were set out as follows:

3. Willson sold its nursing home business on or about May 12, 1981, to Romi Nursing Homes Ltd. ("Romi"). Romi had previously been incorporated on March 31, 1981, and is the present operator of the business being carried on as a nursing home in St. Thomas. In a general security agreement dated November 9, 1982, Romi charged in favour of and granted to the CIBC

a security interest in all of the undertaking, property and assets of Romi. In a debenture dated May 11, 1981, Romi, together with Mirdem Nursing Homes Limited ("Mirdem"), charged to and in favour of United Dominions Investments Limited ("United") all of Romi's undertaking, property and assets to secure the sum of seven hundred and fifty thousand dollars. Mirdem operates a nursing home in Hamilton and is of no significance in this application. In an agreement dated October 1, 1982, United assigned the debenture to the CIBC and all of the monies secured thereunder. On November 12, 1982, the CIBC duly demanded from Romi payment of Romi's indebtedness to the CIBC as secured by the general security agreement and debenture. Romi failed to make the payments so demanded and on November 22, 1982, the CIBC appointed Price as receiver and manager of Romi's undertaking, property and assets pursuant to the terms of the debenture. Price has also taken possession of Romi's assets, including the business.

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5. The licensee of the Nursing Home under the *Nursing Homes Act* is Romi and the licence was renewed on May 12, 1982. There was general concern by Romi and by the Ministry of Health about the manner in which the Nursing Home was being operated and on July 27, 1982, Romi entered into an agreement with 430029 Ontario Limited carrying on business as Krizanc Consulting Services to provide administrative and support services to the Nursing Home. The administrator of the Home on November 22, 1982, was replaced by a Mr. Cranwell who thereafter took his instructions from Price. Price, as the receiver manager, looks after all receipts and disbursements for the Home and Krizanc and Mr. Cranwell look after the day to day administration of the Nursing Home. The concerns over the adequacy of the care which put the licence in jeopardy are still the subject of monitoring by the Ministry of Health. The debenture contains the usual provision whereby the acts of Price as receiver and manager are the acts of Romi. The employees of Romi were advised of the presence of Price and when the last salary cheques for the employees were not honoured by the Bank, they were replaced by Price, not as a matter of requirement under the law, in the view of Price, but as a gesture to the employees. Price has also honoured Romi's duty to bargain to make a new collective agreement and has performed this duty through Mr. Cranwell, the administrator. A conciliation officer was appointed and the differences of the parties were submitted to arbitration under the *Hospital Labour Disputes Arbitration Act*. Two grievances were filed under the collective agreement since the appointment of Price.

6. It is agreed that the CIBC has merely acted in order to protect its security by virtue of the debenture and general security agreement and that the appointment of Price was for no improper reason. CIBC is faced with various alternatives in realizing its security. It may elect to sell the assets of Romi, or it may elect to operate Romi through the receiver/manager as a going concern and then endeavour to find a suitable purchaser for the Nursing Home, bearing in mind that the consent of the Ministry of Health is

necessary for the transfer of the licence. It appears that the CIBC has chosen the latter route and is running the business until a suitable purchaser can be found.

The Board then dismissed the section 63 application as follows:

12. Price was clearly the agent of Romi when it entered into control of the Home on November 22, 1982. The Board does not agree with the criticism of the principal and agency relationship advanced by the applicant. There are valid reasons in commercial law for incorporating the provision in the debenture whereby the receiver/manager is the agent of the debtor company. It is, of course, not always possible for a receiver/manager to secure the co-operation of the officers of a debtor corporation. The principal and agent relationship which exists between Romi and Price is entirely realistic in the context of commercial law. Price managed the Nursing Home for the benefit of Romi and, in our view, the application under section 63 is premature.

13. Price was appointed receiver and manager by means of a private appointment as opposed to a court appointed receiver/manager. This appointment, sometimes referred to as an instrument appointment, has previously been considered by the Board in *Price-Waterhouse Limited*, [1979] OLRB Rep. Jan. 50, where the Board stated at page 51:

7. The Board considers that this application has been prematurely brought. In order for a sale of a business within the meaning of section 55 [now section 63] to occur, it is necessary that there be a disposition from, in this case, the employer that is party to the collective agreement to another person. An examination of the relationship existing between the company and the respondents reveals that this has not yet occurred. What has happened is that a receiver has been appointed to manage the business — so that the Bank which holds a first charge on the assets and undertaking may enforce its security. Although the receiver is carrying on the business for the benefit of the Bank to which it owes a fiduciary duty, its actions are those of the company which retains the legal and equitable ownership of the assets. Under the terms of the debenture constituting the receiver as the agent of the company, the company is “solely responsible for the receiver’s acts or defaults and for its remuneration and the expenses”. In these circumstances, it cannot be said that a disposition within the meaning of section 55 [now section 63] has occurred.

14. It is clear that in this application the applicant still holds bargaining rights and is in a position to negotiate a collective agreement. The applicant would, of course, prefer to negotiate a collective agreement with one or two solvent entities, such as the CIBC or Price. However, the business of running the Nursing Home has not extinguished the bargaining rights, and as long as the business of running the Nursing Home continues to function the obligations between an employer and a trade union still exist. It is quite clear that Price has honoured the terms of the relevant collective agreement since

it has been appointed receiver and manager. Since there has been no sale or disposition within the meaning of section 63, it therefore follows that this application under section 63 is premature and must be dismissed.

The section 1(4)) application was dealt with even more summarily, and dismissed in the following terms:

16. Clearly the facts of this case do not indicate an erosion of bargaining rights by means of a scheme to defeat those bargaining rights. The facts of this application establish a situation where the financial position of Romi, the operator of the Nursing Home, has called for a creditor to take steps to protect its security. The applicant in all of the circumstances of this case has singularly failed to establish its entitlement to any relief under section 1(4) of the Act and its application under that section is dismissed.

3. There have, however, been significant developments since the Board last saw the situation, the principal one being that the "suitable purchaser" referred to in paragraph 6 of the previous decision has now been found. That purchaser is the respondent to the present section 63 application, and one of the respondents to the section 89, Caressant Care Nursing Home of Canada Limited. Caressant Care is an established health-care operator already owning unionized Nursing Homes and Rest Homes across the province. Caressant care in fact entered the St. Thomas scene itself prior to any involvement with Price-Waterhouse or the Willson Nursing Home. In August of 1982, the Ministry of Health called for tenders on an additional 56 beds to service the needs of Elgin County, and Caressant Care was one of the companies entering a bid. Caressant Care's proposal was to provide all of the 56 beds in a new Nursing Home that it would build on property that it owned in the City of St. Thomas, which is located in Elgin County. The Ministry, however, was looking for a wider distribution of the beds, and invited Caressant Care to re-tender on the basis of 41 beds for its proposed St. Thomas facility. Caressant Care did so in December of 1982, and on March 7, 1983, received an award from the Ministry of a 41-bed licence, subject, as always, to final inspection and approval of the facility after it had been constructed. Caressant Care then drew up its plans for a new building which it would construct in St. Thomas to contain 41 Nursing Home beds, and 40 Rest Home beds. The latter type of beds are not funded by the Ministry, and do not require Ministry approval.

4. Just prior to the Ministry's award of the 41 new beds, Caressant Care also became aware through newspaper advertisements that the full assets of the 75-bed Willson Nursing Home in St. Thomas were being put up for tender by the receiver-manager, Price-Waterhouse. That was in February of 1983. Caressant Care responded to the article requesting the full information package, and on March 14th submitted a tender for all of those assets, at a price of \$1,170,000. That tender was made subject to the following conditions:

1. Approval for a minimum 41 Nursing Home bed increase from the Ministry of Health to the Purchaser for the City of St. Thomas, which will result in a minimum total 116 Nursing Home bed licence being granted to said Purchaser.
2. All back pay and benefits paid by the Vendor at his expense plus all accounts outstanding either paid or credited at time of closing.

3. Approval of transfer of the Nursing Home licence from the Ministry of Health.
4. The first mortgage is to be assumed, the second to be assumed to at least a minimum of \$450,000.

5. Price-Waterhouse did not accept the tender of Caressant Care, primarily because the price for the full package was, in its view, too low. It also did not like the financing conditions which Caressant Care was imposing. In addition, it was becoming increasingly concerned over the possibility of litigation over the allocation of the proceeds of any sale involving both the tangible and intangible assets of the Home, owing to the fact that the first security on each of those was held by two different creditors. The "intangible" asset was the 75-bed licence for St. Thomas, and the evidence of all parties to the transaction leaves no doubt that that was by far the most valuable element in the assets owned by the insolvent company. Price-Waterhouse accordingly suggested to Caressant Care that they re-tender on the basis of the licence alone.

6. Caressant Care was only too happy to do that, since the building occupied by Willson Nursing Home was in poor condition, and not particularly well-suited to the running of a Nursing Home, under current Ministry standards. Mr. James Lavelle, a part-owner and Vice-President of Caressant Care Nursing Home of Canada Limited, testified that it was never the intention of Caressant Care to operate a Nursing Home out of the Willson premises, but rather to alter its construction plans for its new Home to accommodate the additional 75 beds. Caressant Care therefore re-tendered for the "licence" alone in the amount of \$907,000. The evidence of Price-Waterhouse is that it felt from its experience in this industry that the right to acquire Nursing Home licences could be valued at 8 to 12 thousand dollars a bed, depending on how large the block was. That would produce a maximum value in this case of \$900,000, but it was obvious to both parties in this case that Caressant Care, being in the process of constructing a new facility for its own beds, could benefit tremendously from economies of scale. Mr. Lavelle also acknowledged in his evidence that the value of the beds was higher if they were already occupied, as they were here. Price-Waterhouse continued to negotiate for a higher price, and the parties ultimately agreed upon a price of \$975,000, or \$13,000 a bed. Caressant Care's acceptance of that price was once again made conditional upon the approval of the Ministry of Health of a licence for Caressant Care for both the 75 *and* its original 41 beds.

7. That took care of Price-Waterhouse's first problem, i.e., the sale of the insolvent Nursing Home's principal asset. There remained for it, however, the problem of managing the Home to meet the continuing demands of the Ministry until the date that Caressant Care's own facility was ready for occupancy and the sale transaction could close, which the parties hoped would be by May 31st of the following year. Price-Waterhouse was unhappy with the management services being provided by Krizanc Consultants, and was about to approach another health-care operator, Diversicare, to replace them. Instead, it made sense to Price-Waterhouse after the agreement had been made with Caressant Care to approach Caressant Care itself about entering the Home at once on a management basis, in order to ensure proper operation of the business and keep in force the asset which Caressant Care had just agreed to purchase. Negotiations in that regard then proceeded at once with Caressant Care, and an offer dealing with both the purchase of the licence and the agreement to manage was prepared by Caressant Care and submitted in writing on April 7, 1983. That offer provided:

AN OFFER TO PURCHASE THE LICENCE OF ROMI NURSING HOME LTD. CARRYING ON BUSINESS AS THE WILLSON NURSING HOME BY CARESSANT CARE NURSING HOME OF CANADA LIMITED, 81 FYE AVENUE, WOODSTOCK, ONTARIO

I, the undersigned, make on behalf of Caressant Care Nursing Home of Canada Limited, ("Caressant"), an offer to Price Waterhouse Limited as Receiver and Manager of Romi Nursing Home Ltd., ("Receiver"), of \$975,000.00 for the right to make application for, and the issuance of, a licence from the Ontario Ministry of Health with respect to the 75-bed licence of Romi Nursing Home Ltd. carrying on business as The Willson Nursing Home. This offer is valid until 5:00 p.m., April 18th, 1983. We have listed below our conditions for the purchase of this licence.

1. Approval of the licence from the Ontario Ministry of Health for a total of 75 plus 41 beds, equalling a total of 116 beds.
2. Not responsible for any expenses or liabilities not authorized by our firm up to the date of us taking over the facility.
3. Caressant will not be responsible for any past wages and benefits outstanding and owing to the employees or any other party as at the date of its assumption of control of the facility as set out in paragraph 4 below, including any potential claims for retroactive wages or benefits accruing to that date.
4. We will operate the Nursing Home from June 1, 1983, or from the date of approval of the licence to be transferred by the Ministry of Health, whichever is the latest. We will pay rent of \$6,300 per month for the use of all the equipment, buildings, etc. needed to run a 75 bed Nursing Home. All buildings and equipment must be kept in reasonable working order by the Receiver at its expense, including all mortgage payments. It is understood that any expense under \$500 will be Caressant's responsibility, any expense between \$500 and \$3,000 will be negotiated between Caressant and the Receiver as to responsibility, and any expense over \$3,000 will be the Receiver's responsibility.
5. On the day of moving the last resident to the new facility to be built in St. Thomas by our firm, we are no longer responsible for any liabilities on the old building and our rent of \$6,300 per month ceases at that time.
6. All profits or losses from the date of us assuming operation of The Willson Nursing Home will be our responsibility.
7. Should any problems develop in the construction, which could delay the opening of our new facility in St. Thomas, we will advise the Receiver immediately. We will also advise the Receiver 60 days before the expected completion of the new facility.

We will make every effort to have the new facility open by May 31st,

1984. However, construction delays caused by strikes, material shortage and/or the Ontario Ministry of Health approval beyond our control, will cause us to be granted an extension which will then allow us to complete the building. For no reason whatsoever will any extension be requested or granted for occupancy by Caressant beyond May 12, 1986.

In consideration for the granting of such extension(s) Caressant agrees to provide further deposit(s) as follows:

- (i) the first further deposit of \$50,000 to be paid on or before September 30, 1984
 - (ii) a subsequent further deposit of \$50,000 to be paid on or before December 31, 1984
 - (iii) subsequent further deposits of \$25,000 each to be paid monthly commencing on January 31, 1985 and to continue to be paid at the end of each following month until the earlier of, the date of the completion of the transaction, or May 12, 1986.
8. In the event that the transaction cannot be completed, Caressant agrees to surrender the control and management of The Willson Nursing Home to the Receiver no later than June 12, 1986.

We will give another \$166,500 as a down payment upon Caressant being accepted by the Ontario Ministry of Health as licensee for the said 75 beds and of Caressant's assuming operation, in accordance with condition 4 above. This will give the Receiver \$250,000 by way of deposit towards the purchase price. This amount will be comprised of the \$58,500 previously given with the tender closing on March 22nd, 1983, plus \$25,000 previously paid March 30th, 1983, and the said \$166,500. The balance of the purchase price will be paid in cash upon the issuance of the 116 bed licence to Caressant in accordance with the conditions listed above.

If our offer is accepted, all of the above conditions, other than those being the responsibility of Caressant, must be complied with or our offer will become null and void with all monies returned to us without interest. It is the Purchaser's right to waive any of the above conditions, if he so desires.

This offer is signed at London, Ontario, this 7th day of April, 1983.

"J. P. Lavelle"
James P. Lavelle
Vice President
Caressant Care Nursing
Home of Canada Limited

A formal agreement on that basis was then executed on May 9, 1983, and the full Management

Agreement entered into on May 20, 1983. At the same time, Caressant Care had its architect revise the building plans for the new facility to add a third wing, in order to accommodate the anticipated addition of 75 Nursing Home beds.

8. The Ministry in fact issued its tentative approval to Caressant Care for the issuance of a licence covering the 75 Willson beds on August 15, 1983. That approval, as usual, was conditional upon final inspection and approval of the new facility into which the beds were to be moved. The understanding from the beginning was that all of the existing residents at Willson Nursing Home would be accommodated in the 75 beds being "transferred" to Caressant Care's new facility. The only exception to this was with respect to a small number of "special care" residents, whom Caressant Care arranged with the Ministry to transfer elsewhere, so that Caressant Care would not be required to provide that kind of service at its new Home.

9. As anticipated by the management agreement, Caressant Care took over operation of the Willson Nursing Home on June 1, 1983. 72 of the Home's beds were occupied as of that date. The services of Krizanc Consultants was terminated by Price-Waterhouse, but the administrator retained by Krizanc to manage the Home, a Mr. Cranwell, was allowed to remain for a few months. In September of 1983, Caressant Care replaced Mr. Cranwell with Carol Hepting, who had been acting as Director of Nursing. Carol Hepting was an employee of Caressant Care, and operated the Home on a day-to-day basis. Mr. Lavelle was present at the Home a couple of days a week at the beginning, and was replaced in that supervisory capacity in September 1983 by Joan MacLinden, who was hired by Caressant Care as Operations Manager for its various Homes, including Willson. Mr. Gerry McKerrol was also hired by Caressant Care as a Manager of Human Resources, and dealt with the applicant union from time to time on labour relations matters at the Willson Nursing Home. Caressant Care prepared all of the employees' payroll information, and submitted it to Price-Waterhouse, together with Price-Waterhouse cheques, ready to be signed. Caressant Care was then obliged under the terms of the Management Agreement to compensate Price-Waterhouse for the total amount of those cheques. Nursing Home licences are renewed annually, and the Willson renewal in May of 1983, prior to the entry of Caressant Care, was placed by the Ministry in the name of Price-Waterhouse, as Receiver-Manager. The licence remained in that state during the period of Caressant Care's management.

10. The relationship of Caressant Care to Price-Waterhouse was never fully explained to the employees or the applicant union, and a good deal of confusion arose with respect to the processing of grievances, particularly at the stage of arbitration. Caressant Care took over the handling and defending of all grievances arising under its tenure, as it was required to do under the terms of the Management Agreement, but the confusion of the union was compounded by a standard form of reply which Caressant Care's solicitors used in responding to all referrals to arbitration, a sample of which reads:

This is to reply to the Union on behalf of our client.

The grievances are denied as set out in the earlier response.

We draw your attention particularly to the position of our client that our client is not a proper party to be named in the grievances, as the Collective Agreement is not binding on our client.

Thank you for your attention in this matter.

Those letters reflected the fact that Caressant Care never considered itself a successor employer, or the employer at all, and thereby a party to the collective agreement, but that it considered itself bound to carry out the terms and conditions of the collective agreement on the insolvent company's behalf, pursuant to its undertaking to Price Waterhouse in paragraph 3(b) of the Management Agreement to:

"... be bound by and adhere to the provisions of all union contracts and collective agreements and to discharge, perform and fulfill all obligations of the Receiver thereunder."

Caressant Care further agreed as "Manager" to:

"... indemnify the Owner and the Receiver against any breach of such union contracts or collective agreements by the Manager during the term hereof."

Caressant Care in fact permitted all grievances to be processed in the normal way and dealt with on their merits, up to and including arbitration, and even applied on its own for expedited arbitration of several of the grievances under the provisions of section 45 of the *Labour Relations Act*.

11. In April of 1984 Caressant Care notified Price-Waterhouse that the new facility was nearing completion, and Price-Waterhouse thereafter sent formal notice of termination to each employee at the Willson Nursing Home in the following form:

(LETTERHEAD OF PRICE WATERHOUSE LIMITED)

ROMI NURSING HOME LTD.
58 St. George Street
St. Thomas, Ontario

REGISTERED MAIL

To: Name and Address of Employee

Re: Termination of Employment

Your employment by Romi Nursing Home Ltd. at its nursing home will terminate upon the closure of the Willson Nursing Home which is anticipated on or after, 1984.

This notice is hereby given pursuant to Section 40 of the Employment Standards Act and Regulation 286 made under the Act.

Yours very truly,

Romi Nursing Home Ltd. by
 Price Waterhouse Limited,
 receiver and manager of
 Romi Nursing Home Ltd.
 Steve Wilson, Esq.
 Vice-President

Caessant Care then wrote the following letter to each of the employees, inviting them to apply for employment with Caessant Care at the new facility:

April 17th, 1984.

Dear

Your employer, Romi Nursing Home Ltd., through its Receiver and Manager Price Waterhouse Limited, has consented to our approaching you in the fashion indicated by this correspondence.

This is to announce that we, Caessant Care Nursing Home of Canada Ltd., are opening a 116 bed Nursing Home and a 40 bed Rest Home in June of this year on Bonnie Place in St. Thomas.

We are now taking applications for employment from persons in the area desiring to obtain positions.

As you may be interested in obtaining a position with us, this is to advise applications are being received at:

Caessant Care Nursing Home of Canada Ltd.
 Box 746
 St. Thomas, Ontario N5P 4C9

Successful applicants will be chosen only from among who so apply.

Yours truly,

"M. Joan McLinden"

M. Joan McLinden,
 Manager of Operations,
 Caessant Care Nursing Home of Canada Ltd.

Caessant Care advertised the positions in the local newspapers as well, and received some 250 applications in all, including the Willson people. The outside applicants were screened and invited to a first interview, and then to a second interview if still interested. The Willson people were invited to only one interview because, as Mr. Lavelle said, they were already known to Caessant Care. The interviews were held at the local Manpower office, and conducted by Caessant Care's Mr. McKerrol and Ms. McLinden. At the interview applicants were taken

through the various terms and conditions of an employment manual which had been prepared by Mr. Lavelle, drawing largely upon Employment Standard requirements and contract language found in one or another of the other collective agreements in effect at Caressant Care's other Nursing and Rest Homes. The wage rate was arrived at by averaging the rates in effect at those other Homes. Most significantly, however, it was explained to each applicant that all jobs at the new Home would be part-time only, and that the hours of work could vary from week to week.

11. Mr. Lavelle in his testimony set out a number of reasons why his company felt that the exclusive use of part-time employees was to its advantage, and stated that the company was "moving in that direction" at its other Homes in the Province. He further testified that contact with the Willson employees was made away from the Home so as not to interfere with the employees' work. In addition, he explained, Willson employees were interviewed last because they would continue to be needed at the Willson Home until such time as all of the residents could be transferred over. In any event, all Willson employees who expressed an interest were offered a job at the new facility. There were 30 or so employees working at Willson Nursing Home at the time of the pending closure, and 15 of those employees initially indicated acceptance of Caressant Care's offer (7 of the 15 changed their minds and rejected the offer subsequent to the first days of hearing into this matter). Some of the Willson people were hired to work in the Rest Home, and others in the Nursing Home. Housekeeping and dietary services were contracted out to Versa Services.

12. On July 3, 1984, Caressant Care's new facility was ready for inspection by the Ministry, and on July 4th its original licence for 41 beds was issued. The 63 remaining Willson residents were then transferred over in the course of the following week. On or about July 12th Price-Waterhouse surrendered the 75-bed licence for Willson, and Caressant Care was granted a 75-bed licence for the new facility following final inspection by the Ministry. The combined facility of 116 Nursing Home beds and 40 Rest Home beds has now been operating with a part-time staff of some 79 employees.

13. On the basis of the foregoing, the applicant Local 220 seeks to support the following allegations:

- (1) that a "sale of a business" occurred between the insolvent company through the Receiver-Manager Price-Waterhouse to Caressant Care Nursing Home of Canada Limited on June 1, 1983, by virtue of the "Management Agreement" and that Caressant Care was the true "employer" of the employees of Willson Nursing Home from and after that date. In that event, the applicant submits that Caressant Care became bound to the applicant's collective agreement for any nursing home operation in the City of St. Thomas, and that the hiring of additional employees to staff Caressant Care's new facility constituted simply an "accretion" to the bargaining unit. That is, any question of "intermingling" subsequent to the opening of the new facility is not relevant, and the provisions of section 63(6) do not come into play;
- (2) alternatively, that a "sale of a business" from the insolvent company through the Receiver-Manager Price-Waterhouse took place on or about July 12, 1984, upon completion of the transaction involving Willson Nursing Home's licence and that the new Home as a result

should have been staffed in accordance with the collective agreement. The applicant submits that in that event subsection 6 of section 63 still would not apply, in that the "intermingling" must be with employees of an ongoing business, not one opened at the same time as the business originally covered by the Union's collective agreement;

- (3) that the form and timing of the offer of part-time work to employees of the Willson Nursing Home amounted to a "non-offer" or refusal to employ in contravention of the *Labour Relations Act*;
- (4) that the respondent Caressant Care as "Manager" ignored the applicant's collective agreement and refused to be bound by it, in contravention of the *Labour Relations Act*;
- (5) that if the Board ultimately finds as a matter of law that no "sale of a business" has taken place, that all of the respondents named in the section 89 complaint, namely Caressant Care, the Canadian Imperial Bank of Commerce, Price-Waterhouse, the Ministry of Health, and the three named officials of the Ministry of Health primarily involved in handling this matter, conspired together to carry out the "transfer" of the Willson licence to Caressant Care in a manner which would avoid the applicant's bargaining rights. The applicant also relied upon the Board's decision in *International Wallcoverings*, [1983] OLRB Rep. Aug. 1316 in arguing that even if the respondents so named had not *intended* to accomplish that purpose, that was the *effect* of what they had done, and thus section 64 of the Act would have been violated.

14. The Board at the hearing indicated that this was not a case comparable to the problematic instances of "clear mistake" or "discipline clearly out of proportion to the misconduct in issue" referred to in *International Wallcoverings*, and not the kind of case where the Board would feel compelled on a balancing of interests to dispense with a requirement of improper motive, at least within the inferential tests laid down in, e.g., *Skyline Hotel*, [1980] OLRB Rep. Dec. 1811. The parties were referred, in a similar vein, to the comments of the Board at paragraph 66 of *Kennedy Lodge Inc.*, [1984] OLRB Rep. July 931. After hearing the evidence and the representations of the applicant, the Board ruled that there was no evidence whatever that the Ministry officials named as respondents had acted other than in accordance with their ordinary responsibilities under the *Nursing Homes Act*, or had played any part in a conspiracy designed one way or the other to affect the applicant's bargaining rights. The complaint insofar as it affected the Ministry of Health or its named officials was accordingly dismissed. The Board also was satisfied at the hearing that Caressant Care in its capacity as Manager during the period June 1, 1983 to July 12, 1984, did not "ignore" the collective agreement, but rather sought to apply it as it interpreted it, in accordance with its undertaking to the Receiver in paragraph 3(b) of the Management Agreement. Caressant Care did not in fact take a position which would prevent any of the matters of interpretation from proceeding to a third-party determination, and in fact sought to expedite the process in certain instances. That it was neither the employer nor a successor employer is a position that it was entitled to take, and whether it was correct in law or not is a matter to be dealt with elsewhere in this decision.

15. In dealing with the main issues before the Board, in terms of a “sale of a business”, and its consequences, two factors stand out in significance for the Board. The first is the fact that Caessant Care engaged in a transaction whereby it purchased the government-restricted right of Romi Nursing Home Ltd. to operate the 75 nursing-care beds formerly at Willson. That is of particular significance in light of the Board’s decision in *Riverview Manor*, [1983] OLRB Rep. Sept. 1564. But a second key circumstance not to be lost sight of, at least in assessing the consequences of any “sale”, is the fact that the beds formerly operated under the collective agreement at Willson came to occupy only a portion of the new Nursing and Rest Home opened in St. Thomas by Caessant Care, and that Caessant Care’s presence in the Nursing Home business in the City of St. Thomas itself was firmly established prior to its entering into negotiations for the right to operate the additional beds which came available through the tender invitation of Price Waterhouse.

16. In the *Riverview Manor* case, *supra*, the operator of Balmoral Nursing Home in Peterborough also was in financial trouble and having difficulty meeting the standards of the Ministry, and ultimately “sold” its licence and some vacant land it held in Peterborough to Daynes Health Care Ltd., an established Nursing Home operator located elsewhere in the Province. Daynes then built a new facility on the land it acquired, and used it to operate the beds formerly under licence to Balmoral. The Board, relying principally on the “transfer” of the licence, found that a “sale” of Balmoral’s “business” had taken place.

17. Counsel for Caessant Care seeks to distinguish *Riverview Manor* primarily on two bases. Firstly, he submits, the Board in *Riverview* did not have before it the detailed evidence of the Ministry of Health as to how the “transfer” and issuance of Nursing Home licences really works. And secondly, the Board in *Riverview* in applying the test of balancing the interests of the employees in the unionized business against the free enterprise interest of the “entrepreneur”, noted the uniqueness of the health care industry, but then failed to take that uniqueness into account. That uniqueness, counsel explains, is the inability of an employer to resolve terms and conditions of employment in a viable way on the normal basis of economic sanctions, because of the mandatory arbitration provisions of the *Hospital Labour Disputes Arbitration Act*. Putting it in more direct terms, counsel submitted that operators in the Nursing Home field have a difficult enough time making a go of it in light of the inadequacy of provincial funding, without the Board, as in this case, saddling the operator with the very collective agreement which has contributed to the downfall of his predecessor. It is of no assistance, counsel urged, for the Board to take cognizance of the problems facing this industry, as in *Kennedy Lodge Inc.*, *supra*, and then refuse to do anything about them.

18. Dealing with counsel’s first point, the evidence of the Ministry makes it clear that licences cannot technically be “transferred” from one operator to another. Rather, one operator agrees to surrender its licence on the condition that the other be granted a comparable one, and it is then up to the second operator to satisfy the Ministry that it is an appropriate replacement. If it does, it is ultimately issued a new licence in its own name. The evidence further discloses that the Ministry can on its own initiative only relieve an operator of its licence on limited and narrow grounds, and after lengthy proceedings. That circumstance, plus the fact that the provincial government tightly controls the number of nursing care beds it will make available in an area (the Ministry pays two-thirds of the cost of each bed), makes an agreement by an existing operator to voluntarily relinquish its rights in favour of another operator an extremely valuable one. The respondent paid just under a million dollars to secure that agreement in the present case.

19. While it is true that the same kind of detailed evidence of the Ministry was not placed before the Board in *Riverview*, there is nothing in that decision which now suggests that the Board in any way misconceived the nature of the transaction before it. The Board, in finding a "sale of a business" in that decision appears to have focussed on the importance of the *licence*, owing to the limited availability of such licences in a given geographic area, and the evidence before the Board in this case only tends to confirm that thinking. In terms of both this and counsel's second point, concerning the weight the Board should be giving to the "entrepreneurial" interest in this case, it might be noted that much of the analysis in *Riverview*, in applying a "balancing of interests" test, is not entirely consistent with the way "sale of business" cases have been analyzed in the past. Rather, the Board has generally focussed on such questions as whether enough of the essential components of the business of the vendor can be traced into the hands of the purchaser as to cause the Board to find that it is in fact the same business, as opposed to a *parallel* business of a similar nature established by the purchaser; or, in other words, whether the purchaser's business can be said to "take its life" from that of the vendor. See, e.g. *Thunder Bay Ambulance* [1978] OLRB Rep. May, 467 at ¶ 13; *Gordons Market*, [1978] OLRB Rep. July 630, at ¶ 17; and more generally, *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1193; *Tatham Company Limited*, [1980] OLRB Rep. March 366. The Board in the concluding paragraphs of the *Riverview* case, in fact, returns to the more typical kind of analysis seen in these cases, and it is really on that basis that the *Riverview* case appears to be decided. At paragraph 38, the Board winds up as follows:

Applying section 63 to the unregulated private sector, the Board has consistently ruled that a successor who acquires all or most of a predecessor's assets and its customers, also inherits a trade union and any collective agreement. *The same criteria ought to be applied to the case at hand, and lead us to the conclusion that a business has been sold.* As to customers, the vast majority of the former residents of Balmoral Lodge are now residing at Riverview Manor. That is not surprising. An employer who gives up a licence or government contract, voluntarily or otherwise, can no longer service its former clientele. Along with the licence or contract, the successor often receives a captive market that is free of competition, not only from the predecessor, but also from others who lack the necessary authorization to carry on business. Riverview obtained two major assets from Balmoral, the licence and the land. The transfer of the licence is particularly significant, because it led most Balmoral residents to move to Riverview Manor. (Both parties to the transaction contemplated residents would move from one home to the other, as evidenced by the contract that ties the date from which interest runs to the transfer of patients.) In this sense, *the licence is of the essence of the business.*

(emphasis added)

20. There was not, in the present case, the transfer of any land by the insolvent company Caessant Care, but as the underlined portion of *Riverview* makes clear, it is the *licence* that is the essence of the Nursing Home business. It is interesting to note, in that regard, that Caessant Care initially tendered 1.17 million dollars for *all* of the assets of Romi (building and land included), and then offered \$907,000 for the licence alone. The Board is satisfied, therefore, that the transaction between Romi (through Price-Waterhouse) and Caessant Care whereby Romi surrendered its licence and Caessant Care acquired an equivalent one, constituted a "sale of a business", within the meaning of section 63 of the *Labour Relations Act*.

21. The Board has also been asked, however, to determine who the true employer was during the period of Caressant Care's operation of the Willson Nursing Home and, closely related to that, whether there had been a "sale of a business" to Caressant Care by virtue of the Management Agreement itself. That agreement, in its final form, provided:

• • •

[The agreement which was reproduced in full in the decision has been omitted: Editor]

22. The Board in *Kennedy Lodge Inc.*, *supra*, most recently reviewed the kind of *indicia* the Board looks to when called upon to determine which of two corporate entities is the "true employer" of a particular group of employees. At paragraph 42, the Board sets out the list of criteria often referred to from *York Condominium Corporation*, [1977] OLRB Rep. Oct. 642 as follows:

- (1) The party exercising direction and control over the employees performing the work;
- (2) the party bearing the burden of remuneration;
- (3) the party imposing discipline;
- (4) the party hiring the employees;
- (5) the party with the authority to dismiss the employees;
- (6) the party which is perceived to be the employer by the employees;
- (7) the existence of an intention to create the relationship of employer-employee.

The Board also went on to note:

While in all of these cases, regardless of the outcome, the Board has attempted to weigh the relative importance of each factor having regard to all of the surrounding circumstances, the Board made it clear in *Sutton Place*, *supra*, that the object of the exercise is to identify, for labour relations purposes, the party exercising "fundamental control over the working lives and the working environment of those in dispute."

23. Where does that form of analysis lead in the present case? In *Kennedy Lodge*, again, the Board noted how difficult it will be, as a practical matter, for an employer to satisfy the Board that it has truly given up effective control over the "core" employees of its enterprise. The same cannot be said, however, where, as here, the original employer has entirely lost control of his assets and operation as a result of insolvency, and has been forced to concur in an arrangement whereby possession and management have been taken over by a creditor appointed Receiver-Manager. Particularly where that "Receiver-Manager" is not someone experienced in the Nursing Home business, it would not be surprising to find that the Receiver-Manager is anxious to find an operator who does have such experience and who can step fully into the shoes, at least on an interim basis, of the original owner/operator of the Home. In that way

the Receiver-Manager can remove itself from the day-to-day operation of a business it lacks the expertise to run, while hopefully ensuring that the business will continue to be run in a way that would keep the licence of the Home intact for ultimate “sale”. While the earlier arrangement with Krizanc Consulting is not before us, it is apparent from the Management Agreement and the evidence that the foregoing is precisely what was done with Caressant Care. In total contrast to the *Kennedy Lodge* case, the original owner here (*or* its agent, Price Waterhouse) retained no Director of Nursing, nursing supervisors or charge nurses on the premises. In fact, neither Romi nor Price-Waterhouse retained *any* form of supervisor on the premises. All of the management staff, including ultimately the administrator, were employees of Caressant Care. Caressant Care ran the Home in all material ways on a day-to-day basis and exercised ongoing control over both nursing and staffing policies in the Home. In terms of the criteria set out above from *York Condominium*, it is clear that the day-to-day direction and control over the employees working at the Home was exercised by Caressant Care. While Price-Waterhouse was the nominal paymaster (insofar as it signed the “Price-Waterhouse” cheques prepared by Caressant Care), the burden of that remuneration ultimately fell upon Caressant Care alone. The Management Agreement conferred on Caressant Care the authority to hire, fire and discipline, and it expressly affirmed to the Union at one of the arbitrations testified to that it had those powers, and that the discipline which arose under its management and which was the subject of the arbitration was the action of Caressant Care pursuant to those powers. While Caressant Care appears to have honoured its formal obligations under the Management Agreement to generally keep Price-Waterhouse informed of the existence, or proposed settlement, of grievances, there is no evidence whatsoever of Price-Waterhouse in any way playing an active role in or interfering with Caressant Care’s handling of the labour relations of the Home. Caressant Care clearly was left to its own expertise and that of its legal counsel in interpreting and applying the terms of the collective agreement (it showed no interest whatever in the basis on which grievances handled by Price-Waterhouse prior to June 1, 1983 had been determined or resolved), in defending (at its own expense) its position when challenged both in the grievance procedure and at arbitration, and, if shown to have erred in its application of the collective agreement, to pay, through its indemnification of the Receiver, the cost. Indeed, it is difficult to discover any substantial change in Caressant Care’s position should it ultimately be declared to be the true employer.

24. The sixth and seventh criteria cited in *York Condominium*, the party which is perceived to be the employer by the employees, and the existence of an intention to create the relationship of employer-employee, are generally deserving of only limited weight. Both are subjective, and readily lend themselves to self-serving evidence. The Board did not, for example, find particularly compelling the explanation by the employee who testified of the basis on which she in her own perception distinguished Caressant Care as her “employer” from its predecessor, Krizanc. The Management Agreement, on the other hand, specifically stated: “the Manager shall hire, supervise, train and, as necessary, discuss all personnel (*who shall be employees of the owner* but subject to the control of the Manager)” (emphasis added). This one line in the Management Agreement, together with Price-Waterhouse’s name on the paycheques, is essentially the only indication that anyone other than Caressant Care was acting as the employer of these people. And in *K-Mart Limited*, [1983] OLRB Rep. May 649, the Board observed:

... The Board has consistently found that neither private arrangements as to who is the employer, nor administrative paymaster arrangements, are indicative of the true employer.

On the basis of all of the material criteria indicating the essential control over the working

lives of these employees, we have no difficulty concluding that Caressant Care Nursing Home of Canada Limited was, throughout the life of the Management Agreement, the true employer.

25. The applicant goes further, however, and submits that the arrangements embodied in the Management Agreement also constitute a "sale of a business" from the insolvent company through Price-Waterhouse to Caressant Care Nursing Home of Canada Limited. In support of its argument in this regard, the applicant relies upon the not dissimilar set of facts before the Board in *Hamilton Cargo Transit Limited*, [1983] OLRB Rep. June 887. There an instrument-appointed receiver had taken over control of the cartage operation of an insolvent company, and subsequently entered into an agreement under which the operation would ultimately be sold to a third party. The Receiver then entered into a management contract with a company related in an undefined way to the ultimate purchaser for that company to operate and preserve the business as a going concern, pending the final sale, in return for which the profit generated from such operation would enure to the benefit of the manager. The Board considered the case of *Price-Waterhouse Limited*, [1983] OLRB Rep. Jan. 50 (cited in the *Price-Waterhouse* decision which preceded the present application), and concluded that the parties under the management contract had gone a significant step further from when the Receiver itself was carrying on the business. The Board wrote:

8. In the *Price Waterhouse* case, the Receiver was itself carrying on the business for the insolvent company to protect the Bank's interest while a suitable purchaser was being sought. The Board commented as follows:

7. The Board considers that this application has been prematurely brought. In order for a sale of a business within the meaning of Section [63] to occur, it is necessary that there be a disposition from, in this case, the employer that is party to the collective agreement to another person. An examination of the relationship existing between the company and the respondents reveals that this has not yet occurred. What has happened is that a receiver has been appointed to manage the business — so that the Bank which holds a first charge on the assets and undertaking may enforce its security. Although the receiver is carrying on the business for the benefit of the Bank to which it owes a fiduciary duty, its actions are those of the company which retains the legal and equitable ownership of the assets. Under the terms of the debenture constituting the receiver as the agent of the company, the company is "solely responsible for the receiver's acts or defaults and for its remuneration and expenses." In these circumstances, it cannot be said that a disposition within the meaning of Section [63] has occurred.

In the present case, the agreement between the Receiver, the Bank and 268121 Ontario Limited provides in paragraph 1:

... the day-to-day operations of the Company shall be managed by the Manager under the supervision and control of the Receiver.

Beyond that, there are considerable differences, however, between this case and the *Price-Waterhouse* case. In this case, the revenues generated from

the operation of the business do not enure to the benefit of either the Bank or the debtor company. Rather, the agreement provides in paragraph 8:

All revenues earned for trucking under the Management Agreement will belong solely to the Manager, subject to all expenses specifically incurred in those operations under the Management Agreement and will not form part of the monies available to any creditors of the Company.

And in conjunction with this, at paragraph 7:

The Manager shall be entitled to use the Company's equipment and inventory during the term of the Management Period. . . .

In consideration of this, the Manager agrees to pay the bank as part of the Manager's "expenses" a monthly fixed sum in the amount of \$500.00, "such payments being intended to partially compensate the Bank for the use of the company's assets secured in favour of the Bank."

9. Again, unlike the *Price-Waterhouse* case where the Receiver at all times was acting solely as the agent of the defaulting company in the continued operation of the company's business, so that the defaulting company at all times remained responsible, the present agreement provides in paragraph 3:

The Manager shall indemnify the Receiver and the Bank and hold the Receiver and the Bank harmless from and against any operating losses, damages, actions, claims, costs and expenses that are incurred during the Management Period.

The Manager also has the authority and the responsibility for the normal billing and collection of accounts, and, again, does so solely for its own benefit, with the exception of the accounts that were outstanding as of the date that the Manager took over. Specifically, its responsibilities are described in paragraph 5 as follows:

During the Management Period, the Manager shall:

- (a) Only operate in accordance with the normal course of the Business and only in accordance with such rates as are filed by the Company with the regulatory bodies;
- (b) Prepare and file all reports as required by various government authorities;
- (c) Manage the Business of the Company in accordance with the Company's Operating Authorities and all applicable laws, regulations and by-laws;
- (d) Use its best efforts to promote the interests of the Business of the

Company and to protect the rights and interests of the Company in the Business;

- (e) Use its best efforts to provide a first class service to the shipping public;
- (f) Maintain the Company's accounts, books and records and prepare on behalf and submit to the Bank and the Receiver monthly cash flow statements and provide the Bank and the Receiver with full and unobstructed access to the said accounts, books and records;
- (g) Cause the Company's employees, at the Manager's expense, to take all appropriate steps to collect any and all accounts receivable which are or may be owing to the Company prior to the commencement of the Management Period, the Manager hereby covenanting with the Bank and the Receiver that such funds so received will be deposited in the Bank's Trust as provided in paragraph 10 hereof; provided that "appropriate steps" shall not include the institution of any legal proceedings except upon the Receiver giving instructions to that effect and then at the cost and expense of the Receiver;
- (h) Cause the Company's employees, at the Manager's expense, to carry out normal accounting and associated functions such as preparation and delivery of income tax statements as to source deductions for employees, severance notices, etc. for the period ending on the commencement of the Management Period; and
- (i) Provide such coverage of insurance for the operation of the company during the Management Period, and for such amounts as the Bank and the Receiver require, and provide the Bank and the Receiver with proof thereof.

10. From all of the above, it can be seen that, contrary to the situation existing in, for example, the *Price-Waterhouse* case, any profit from the current operation of the business enures to the benefit of the "Manager". The Bank's sole interest is to have the business preserved in its present form for ultimate sale as a "going concern". Consistent with that, there are certain other limitations on the authority of the Manager. These are set out in paragraph 6 as follows:

During the Management Period, the Manager shall not, without the prior written consent of the Bank and the Receiver:

- (a) Mortgage, charge, sell or otherwise dispose of any property of the Company;
- (b) Make any expenditures on behalf of the Company out of the ordinary course of business;

- (c) Incur any indebtedness on the part of the Company for borrowed money.

The whole arrangement, in fact, has far more the attributes of a “lease”, than it does of a “sale” in the ordinary sense. But the definition of a “sale” under the Act is extremely broad, and in fact uses the term “lease” itself. Section 63(1)(b) provides:

“sells” includes leases, transfers and any other manner of disposition, and “sold” and “sale” have corresponding meanings.

And as the Board has said, for example in *Thunder Bay Ambulance Services Inc.* [1978] OLRB Rep. May 467, at paragraphs 11 and 12:

11. . . . The word “sells” as used in Section 55 [now section 63] of the Act encompasses any transaction or series of transactions which results in the transfer of the predecessor’s ‘business’ or parts thereof.

12. The expansive meaning which attaches to the term ‘sells’ as used in Section 55 underscores the purpose of the section. The section is designed to preserve bargaining rights regardless of the legal form of the transaction, where there is a continuum of the business. The Board discussed the intent of the section in *Aircraft Metal Specialists Limited*, [1970] OLRB Rep. Sept. 702 in the following terms:

“Once the union has been recognized with respect to a particular business the union then obtains a right to bargain with respect to wages, hours and other conditions of employment in that business. The right to participate in the business and its functions in that manner is in the nature of a vested right and Section 47A (now Section 55) allows the union to pursue that bargaining right when all or part of the business is sold.”

Bargaining rights which are conferred by the Board or by voluntary recognition attach to a particular business and continue by operation of Section 55 so long as the business continues.

The very use of the word “lease” in the definition in the Act seems to leave no doubt that the transfer of assets contemplated by the section may be for a limited period only, and that title to the assets need not pass at all. The inquiry is by no means academic, since an arrangement like the present may continue for months or even years prior to the time that an ultimate sale of the business is completed.

The parallels between that and the present case are striking. The Board in *Hamilton Cargo* essentially found that the fixed monthly fee payable by the Manager to the Receiver amounted to the payment of rent for the opportunity to take possession of the insolvent company’s assets and run the business for the Manager’s own profit. Here the Management Agreement carefully identifies the payments made to the Receiver as “compensation”, but the terms of the original contract set out in Caressant Care’s letter to the Receiver simply stated:

We will pay rent of \$6,300 per month for the use of all the equipment, buildings, etc. needed to run a 75-bed Nursing Home.

And, in return:

All profits or losses from the date of us assuming operation of the Willson Nursing Home will be our responsibility.

Consistent with that, the Management Agreement provides that Caressant Care assumes the responsibility for all taxes, both business and realty, adequate insurance, and the compensation of all staff, while at the same time having sole entitlement to "all funds received from the Ontario Ministry of Health, OHIP, Blue Cross and other resources for care services to patients at the Facility, private charges for care of patients, rental of equipment to patients, and revenues from sales of goods and services and the provision of services at the Facility during the term of this Agreement. . .". The manager further undertakes to indemnify the Receiver for all claims arising after the occupation date of June 1, 1983, and the Receiver undertakes to indemnify the Manager for all claims arising prior.

26. All of this points to Caressant Care having acquired a substantial enough beneficial interest in the operation of the Wilson Nursing Home as to come within the expansive definition of a "sale" contained in section 63 of the Act. But Caressant Care argues that no "sale" could take place, in the special circumstances of a Nursing Home case, without the final approval of the Ministry of Health being given, and that approval was not forthcoming until July 12, 1984. We do not agree. While the licence is the *sine qua non* of the business, the fact is that a licence was in effect for the Willson Nursing Home throughout the "management" period, in the name of the Receiver, Price Waterhouse. If Price Waterhouse chose to market to a third party, Caressant Care, the right to take possession of the Home and run the business for profit under the umbrella of the licence it held, that was up to Price Waterhouse. The situation might have been reflected more accurately if the Ministry had chosen to issue a temporary licence in the name of the experienced operator actually running the Home during this interim period, as it had for Price Waterhouse, but it is not clear what such a procedure would involve, and it does not, from the point of view of *The Labour Relations Act*, change the *substance* of what had occurred. The Ministry was in fact monitoring the situation, and was obviously happy to have someone put into the Willson Nursing Home capable of maintaining the proper standards. The "Management" transaction between Price Waterhouse and Caressant Care in our view really amounted to Caressant Care, with Ministry approval, "renting" the use of the licence, just as it did the other assets of Romi, and was, for the same reasons given in *Hamilton Cargo*, a "sale" within the meaning of section 63 of the Act, for the interim period of the Management Agreement. It might be noted that the applicant was specifically *not* taking the position that such a finding rendered Caressant Care liable for the payment of any claims arising prior to June 1, 1983.

27. The only remaining allegation, therefore, is that Caressant Care's offer of "part-time" employment to the union-represented individuals formerly employed at the Willson Home amounted to a "non-offer", deliberately designed to discourage those employees from taking employment at the new facility. As noted earlier, about half of the thirty or so employees at Willson initially accepted the offer from Caressant Care, but another half of that group changed their mind and declined subsequent to the first days of hearing in this matter. There are now 8 employees from the Willson Nursing Home working at Caressant Care. The President of the Willson bargaining unit, Mrs. North, was called to give evidence about her interview with

Mr. McKerrol and Mrs. McLinden. She testified that it was made known to her that the job was "part-time" only, but that she discovered from further discussions after she had accepted that the number of shifts each week might vary. She also was advised at the initial interview that there might be some experimentation with less than 8-hour shifts, but concedes that the reason she asked about that was because such experimentation had already begun at Willson. Mrs. North also asked whether the proposed posting provisions for "vacancies" included full-time jobs. She was reminded that the company was contemplating the existence of only part-time jobs "for the moment", and she then asked, if that changed, would the word "vacancies" include full-time jobs. She was told it would. The evidence of Mr. Lavelle, again, was that his company has determined that the use of part-time staff provides overwhelming advantages to management in terms of cost and flexibility, and that the company was "moving toward" that, albeit more slowly, in its other unionized operations (which includes the Service Employees Union). That testimony by Mr. Lavelle was not challenged by the applicant.

28. The Board does not conclude on the evidence that Caressant Care made the offer that it did to the employees at Willson for an improper purpose. That offer was the same as was made to all prospective employees, and we are satisfied was an attempt to introduce at what Caressant Care thought was a non-union Home the management practices it had decided it would like to institute where it could. In our view the tenor of the job interview with Mrs. North, for example, referring to the use of part-time employment "for the moment", does not support an intention to discourage employees from coming to the new Home. We further find that the somewhat formal way in which Caressant Care approached employees to join it at the new facility, and conducted job interviews through Manpower, is reflective of Caressant's efforts to reinforce its always-held position that it was not the "employer" at Willson, rather than of any ill-interest towards either the employees or their union. The complaint under section 89 is accordingly dismissed in its entirety.

29. It remains for the Board to determine the consequences of both of its "sale" findings under section 63 of the Act. The applicant submits that the finding of a "sale" to Caressant Care as of June 1, 1983, effectively puts an end to the issues raised by this application. It argues that the respondent Caressant Care at that point became bound by the collective agreement's scope clause, covering "all employees of the Willson Nursing Home Limited at St. Thomas, Ontario", and that any additional hirings in the City of St. Thomas thereafter were simply an "accretion" to the bargaining unit. Caressant Care, on the other hand, urges the Board to take into account that even though the existing collective agreement is now up for renewal, it does not in this industry have the ultimate power, through free collective bargaining, to assure itself that it will not have to continue to be bound by the very terms and conditions of the predecessor's agreement which, it argues, contributed to the downfall of the predecessor.

30. The Board does not accept either submission. Section 63, subsection (2) of the Act provides:

Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise

declares, the employer for the purposes of the application as it he were named as the employer in the application.

If a purchaser engages in a transaction which constitutes a "sale of a business" within the meaning of the section, in other words, he is bound by any collective agreement covering that business from the time of the sale, and "until the Board otherwise declares". The basis on which the Board might "otherwise declare" is set out in other subsections of the Act, in particular subsections 5, 6, and, in the case of municipal mergers, 11. Subsection 5 gives the Board the option of terminating the bargaining rights of the trade union, and hence releasing the employer from the terms of the collective agreement, if, in the opinion of the Board, "the person to whom the business was sold has changed its character so that it is substantially different from the business of the predecessor employer". As the Board has observed, for example in *Winco-Steak'n Burger*, [1974] OLRB Rep. Nov. 788:

"The implementation of subsection 5 of section 55 [now 63] involves the revocation of the remedial effects otherwise flowing from the provisions of section 55 of the Act following the sale of a business. Having in mind the fact that subsection 5 runs against the flow of the general intent of the section, the Board takes the view that the words 'substantially different' must be viewed by the Board in the formulation of its opinion as involving a fundamental difference affecting the nature of the work requirements and skills involved in the business to the extent that continued representation by the trade union would be inadequate, inappropriate or unreasonable in all the circumstances of the particular case under review."

Moving the business of the Willson Nursing Home to upgraded facilities does not in our view, contrary to the submission of Caressant Care, come anywhere close to the kind of change envisioned by the subsection. The other ground for terminating bargaining rights or a collective agreement after a "sale" is set out in subsection 6, dealing with "intermingling", and will be dealt with *infra*. The section does not appear to contemplate other grounds for such termination. We agree with the comments of the Board in *Kennedy Lodge Inc.*, referred to by counsel for Caressant Care, that if an economic problem currently exists within this industry, the balancing of interests implicit in any proposed solution is not the appropriate function of the Labour Relations Board.

31. On the other hand, the facts in this case do not lead us in the direction of the applicant's conclusion either, that the collective agreement, by virtue of the sale under the Management Contract, should simply apply to all employees at the new Home. There has, in our view, been an intermingling of the employees of two businesses being carried on by Caressant Care, as contemplated from the outset, and the provisions of section 63(6) apply. That subsection provides:

Notwithstanding subsection (2) and (3), where a business was sold to a person who carries on one or more other businesses and a trade union or council of trade unions is the bargaining agent of the employees in any of the businesses and such person intermingles the employees of one of the businesses with those of another of the businesses, the Board may, upon the application of any person, trade union or council of trade unions concerned,

- (a) declare that the person to whom the business was sold is no longer bound by the collective agreement referred to in subsection (2);
- (b) determine whether the employees concerned constitute one or more appropriate bargaining units;
- (c) declare which trade union, trade unions or council of trade unions, if any, shall be the bargaining agent or agents for the employees in such unit or units; and
- (d) amend, to such extent as the Board considers necessary, any certificate issued to any trade union or council of trade unions or any bargaining unit defined in any collective agreement.

Subsection 8 of section 63 provides further:

Before disposing of any application under this section, the Board may make such inquiry, may require the production of such evidence and the doing of such things, or may hold such representation votes, as it considers appropriate.

32. But the applicant argues that any and all employees of Caressant Care in the City of St. Thomas were covered by the scope clause of the collective agreement it “inherited”, so that no “intermingling” of union and non-union businesses or employees could be said to have taken place subsequently. The Willson agreement states that it applies to:

All employees of the Willson Nursing Home Limited at St. Thomas, Ontario, save and except supervisor, persons above the rank of supervisor, registered nurses, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period and office staff and,

All employees of the Willson Nursing Home Limited at St. Thomas, Ontario, regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, registered nurses and office staff.

The applicant relies chiefly on the comments of the Board in *Bermay Corporation Limited*, [1980] OLRB Rep. February 166. At paragraph 26 of that decision, the Board commented on the discretion given it under section 63 (then 55) subsection 6 as follows:

... the discretion only comes into play when there has been an intermingling of employees. When a unionized business is transferred to an employer who does not introduce employees from another business into the bargaining unit of predecessor employees, the Board does not have a discretion to declare that a collective agreement no longer binds the successor employer. Nor does the Board have that discretion when the sale of a business has occurred and all of the employees are either newly hired by the successor employer or entirely transferred from another of its businesses. The discretion arises only

when there has been a mixing of employees from another business with the employees of the transferred business. . . .

We agree with that statement. All three examples referred to by the Board do not deal with cases of two businesses being merged or “intermingled”. They deal with the staffing and operation of one business only. The first example is the simplest, where no new employees whatever are used to staff the purchased business. The second example is where all employees are hired “off the street”, as it were, to staff the purchased business. And the third is where the purchased business, once again, is *not* being run in an integrated way with another business owned by the purchaser, but the purchaser uses employees from that other business to staff the new business nonetheless. None of these are cases of “intermingling”, within the meaning of section 63(6), and none of these give rise to the forms of relief which that subsection provides. Indeed, where a business covered by a collective agreement is purchased and is not expanded by or integrated with the work provided by a second existing ‘business’, it is difficult to see how the provisions of section 63(6) can be meant to apply at all, irrespective of where the employees may be drawn from. A purchasing employer does not, in other words, create a situation where the bargaining rights attaching to a single, newly-acquired business are called into question simply by supplementing the bargaining unit with employees not previously covered by the collective agreement, whether those employees are selected from “off the street”, or from an entirely different location of the employer. A purchaser dealing with a single business is in the same shoes as the vendor vis-a-vis the collective agreement. It is true that the subsection speaks of the purchaser intermingling the *employees* of one business with those of another. But that appears to be simply a more precise way of referring to the intermingling of the businesses themselves: it is in fact the “employees” of the businesses who are capable of being “intermingled”. The focus of section 63 is on the *business*, and it is the practical problem of running two *integrated* businesses, either each ostensibly under a different collective agreement, or one under a collective agreement and one “non-union”, which would appear to have prompted the Legislature to provide the relief contemplated by subsection 6. And consistent with this rationale behind the subsection, it is only the employees of the business that was sold which continue to be covered by the collective agreement, just as in subsection 3 a trade union “continues to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit *in that business*”. That subsection provides:

(3) Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or has given or is entitled to give notice under section 14 or 53, sells his business, the trade union, or council of trade unions continues, until the Board otherwise declares, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement or the renewal, with or without modifications, of the agreement then in operation and such notice has the same effect as a notice under section 14 or 53, as the case requires.

Were it otherwise, i.e., if the collective agreement or bargaining rights immediately applied to the employees of *both* businesses upon an intermingling, the language of subsection 6 would mean in a “two-union” situation that both collective agreements would apply to all employees of both businesses “until the Board otherwise declares”, with whatever conflicting liabilities might arise from that for the employer pending a determination by the Board. We do not think

that that is what the Legislature intended. Indeed, this precise point was one of the early ones which the Board had to decide under the 1970 amendments preserving collective agreements in addition to bargaining rights, in the case of *Bryant Press Limited*, [1977] OLRB Rep. April 301. There similar businesses of the vendor, McCorquodale and Blades, and of the purchaser, Bryant Press, were merged at one location, and the Board wrote:

5. Counsel for the [trade union] submits that the collective agreement between the [trade union] and McCorquodale & Blades bound not only the former composing room and proof room employees of the latter company, but also was binding upon the composing room and proof room employees of Bryant, since Bryant, by the provisions of subsection (2) of section 55, in effect, became a party to the collective agreement and its composing room and proof room employees fall within the recognition clause of the agreement. This being so, counsel submits there has not been an "intermingling" of employees as contemplated by subsection (6) of section 55 and accordingly there is no basis for the Board to make any other declaration than that the [union] acquired the bargaining rights for the composing room and proof room employees of both the vendor and purchasing companies as a result of the sale by virtue of the [union's] collective agreement with the vendor.

6. Subsection (2) of section 55 provides that the purchaser of a business is bound by a collective agreement entered into by the vendor as if he had been a party thereto. The parties to the collective agreement in the instant case were the respondent and McCorquodale & Blades and the employees bound by the agreement prior to the sale were the composing room and proof room employees of McCorquodale & Blades. As we read subsection (2), *it is implicit in the language of the subsection that the employees bound by the collective agreement subsequent to a sale are only those employees who were bound by the collective agreement prior to the sale.* [Emphasis added] In the instant case this means the former composing room and proof room employees of McCorquodale & Blades. The above interpretation of subsection (2), moreover, is consistent with the purpose of section 55 which is to preserve existing bargaining rights held by a trade union as a result of the sale of a business. The intent of the section was not to give to a trade union bargaining rights which it had not previously held. We would further point out that subsection (3) lends support to the above interpretation of subsection (2). More particularly, subsection (3) provides that a trade union which holds bargaining rights for a unit of employees of a vendor continues to hold those bargaining rights for the employees of the purchaser in the *like* bargaining unit. By analogy with subsection (3), the unit of employees covered by a collective agreement which becomes binding upon a purchaser under subsection (2) would also be the employees in the *like* bargaining unit. For the foregoing reasons, we cannot accept the interpretation placed on subsection (2) of section 55 by counsel for the [Union]. We find rather that as of the date of the sale of the business of McCorquodale & Blades and Bryant on March 15, 1971, the collective agreement to which Bryant became a party by reason of the sale only remained binding on the former employees of McCorquodale & Blades. Accordingly, once the intermingling of the employees of the two companies commenced, Bryant was entitled to

make the instant application and to apply for the remedies available under subsection (6) of section 55.

This appears to us after further experience to be the only conclusion consistent with the language and objectives of section 63, and to the extent that the Board in *Bermay Corporation Limited* felt compelled to cast doubt on the correctness of *Bryant Press*, we find ourselves not able to agree with that portion of *Bermay*. It should be noted that the Board in *Bermay* had before it a situation where the business of the purchaser was poured into the location covered by the collective agreement of the vendor, and the Board may well have viewed the circumstances before it as more akin to an "accretion". It might also be noted that the comments of the Board in *Bermay* came only after the Board had *already* taken a representation vote because of the "intermingling".

33. It follows from *Bryant Press* that the bargaining rights extended to a purchaser by the operation of the province's "sale of business" legislation are somewhat more particularly defined than are bargaining rights obtained either through certification or voluntary recognition: i.e. by the business itself. Like section 1(4) of the Act, in other words, section 63 is remedial legislation designed to *preserve*, but not extend, the *status quo*. Section 63(2) states that the purchaser becomes bound by the collective agreement "as if he were a party thereto". What it comes down to is the effect the Legislature had in mind for the legal fiction created by those words. As can be seen in the passage quoted above, the Board in *Bryant Press* looked for guidance in that regard to subsection 3 of section 63, which was the original "successor rights" provision in the statute, and which provided the *lesser* remedy of preserving a union's bargaining rights only. That original subsection made it explicit that such bargaining rights were, on a "sale", being made to run only with "the *like* bargaining unit *in that business*". The Board in *Bryant Press* found it to be the intention of the Legislature that the legal effect of the employer being deemed to be a party to the collective agreement under subsection 2 is circumscribed in exactly the same way. That is, under section 63(2) the scope clause into which the purchaser is inserted remains specific to the business initially covered. If, for example, an employer operates six Nursing Homes in the City of St. Thomas, the employees of none of which had ever indicated a desire to be represented by a trade union, and that employer purchases a seventh Nursing Home which is unionized and has a collective agreement, the other six Nursing Homes do not on the day of the "sale" become covered by the collective agreement, even if it is stated in its scope clause to apply to "all employees [of a named company] in the City of St. Thomas". That is the thrust of the union's submission on the effect of the earlier sale here.

34. We do not so find. Rather, we find that, commencing July 4, 1984, the employees of a business covered by a collective agreement (the 75-beds of the Willson Nursing Home) were intermingled with the employees of a business not covered by a collective agreement (the 41-bed Nursing Home and the 40-bed Rest Home that Caressant Care had on its own). The provisions of section 63(6) must therefore be applied, and this normally is done on the basis of comparative numbers. In *Bryant Press*, for example, one-third of the combined employees came from the operation covered by the collective agreement, and two-thirds were unrepresented by any trade union. The Board directed the taking of a representation vote. The numbers in the present case are not so apparent, however. The applicant and Caressant Care both agreed at the hearing that if the Board were ultimately to see fit to order a vote under 63(6), the appropriate voting constituency (as opposed to ultimate "bargaining unit") would include all employees of the Home, be it for the 75 "Willson" beds, the 41 Caressant Care beds, or the 40 Rest Home beds. The problem is that the Board's declaration of a "sale" of the Willson beds means that Caressant Care was obliged to offer to continue the employment of "Willson"

employees in accordance with the terms of that collective agreement, as the Board noted in *Bermay Corporation Limited* itself, *supra*, at paragraph 18. To the same effect see *Emrick Plastics*, [1982] OLRB Rep. June 861. Caressant Care has made no pretence of the fact that that was not done.

35. The figures provided by Caressant Care in evidence do not suggest, however, that the changes in overall staff complement would be that dramatic (from the existing 79), and the fact is that even if *all* of the employees available from Willson were to take jobs, the mix of “covered” and “not-covered” employees would be around the 50 per cent mark. In the circumstances, the Board does not consider it appropriate to defer its disposition of this application until after the staffing process has been reconsidered. Rather, the Board hereby advises all parties that it will direct the taking of a representation vote amongst all of the employees in the Home once the re-staffing of the “Willson” portion of the Home has been completed. All employees of the Home will thus be given the opportunity to indicate whether they wish to be represented by the applicant in collective bargaining. Such re-staffing, once again, will mean staffing the jobs fairly allocable to the “Willson” portion of the Home in a manner consistent with the rights of the original “Willson” employees under the terms and conditions of the collective agreement. The parties are directed to notify the Board in writing when that process has been completed.

36. The remedies the Board has found appropriate in this case have, we recognize, produced an unusual circumstance. The Board does not generally direct the taking of a representation vote without being in a position to freeze the list of employees eligible to vote. Both of the principal parties at the hearing, however, expressed a desire to end the protracted litigation surrounding this matter, and hopefully both can now sit down together and agree without delay upon a reasonable basis for re-staffing the “Willson” portion of the Home, so that the vote can proceed.

37. In summary, the Board at this point declares:

- 1) that Caressant Care Nursing Home of Canada Limited was the employer of the employees at the Willson Nursing Home from and after June 1, 1983;
- 2) that a “sale of a business” took place from Romi Nursing Homes Ltd. to Caressant Care Nursing Home of Canada Limited on June 1, 1983, and that Caressant Care Nursing Home of Canada Limited was, as a result, bound by the applicant’s collective agreement for that business as of June 1, 1983; and
- 3) that a further “sale of a business” from Romi Nursing Homes Ltd. to Caressant Care Nursing Home of Canada Limited took place on or about July 4, 1984, and that, as a result, Caressant Care continued to be bound by the applicant’s collective agreement for that business from and after that date.

38. For the foregoing reasons, the Board, in the exercise of its discretion under section 63(8) of the *Labour Relations Act*, hereby directs that a representation vote be taken amongst all of the employees of Caressant Care Nursing Home of Canada Limited’s new Home in St.

Thomas once the staffing of the "Willson" portion of that Home has been completed in accordance with the aforesaid collective agreement.

1296-82-U;0195-83-U Luciano D'Alessandro and Donato Marinaro, Complainants, v. Labourers' International Union of North America, Local 1089, and Rocco D'Andrea, Respondents

Duty of Fair Referral — Evidence — Practice and Procedure — Unfair Labour Practice — Whether transcript of criminal proceedings in County Court admissible in Board unfair labour practice proceeding

BEFORE: Robert D. Howe, Acting Chairman, and Board Members F. W. Murray and W. F. Rutherford.

APPEARANCES: *Ed J. Brogden for the complainants; A. M. Minsky, R. D'Andrea and D. D'Andrea for the respondents.*

DECISION OF THE BOARD; August 17, 1984

1. The purpose of this decision is to provide in written form certain unanimous oral rulings given by the Board at various stages of these ongoing consolidated proceedings, as jointly requested by counsel for the complainants and counsel for the respondents.

2. On February 2, 1984 the Board ruled as follows:

[Rulings other than that relating to the admissibility of court transcript have been omitted: Editor]

• • •

3. On August 9, 1984, the Board ruled as follows with respect to the admissibility of a transcript of the evidence given by the respondent Rocco D'Andrea in certain other proceedings:

Having carefully considered the submissions of counsel, we have decided to exercise our discretion under section 103(2)(c) of the *Labour Relations Act* and under section 15 of the *Statutory Powers Procedure Act* to admit the transcript of the evidence given by the respondent Rocco D'Andrea in proceedings against him in the County Court Judges Criminal Court of the County of Lambton concerning alleged alteration of Union Executive Board Minutes pertaining to the operation of the Local 1089 hiring hall. In ruling in favour of admitting this transcript, we make no ruling as to the weight, if any, to be given to such transcript as we are of the view that that is a matter best left for decision, if necessary, after we have heard final argument. In opposing the admission of that transcript, Mr. Minsky submits that

it does not contain any admissions against interest by Mr. D'Andrea. However, as noted by complainants' counsel, the Board cannot decide whether or not the transcript contains any such admissions until it has received and read the transcript. In view of our broad powers to admit (and act upon) any oral testimony and any document or other thing relevant to the subject matter of the proceedings, it is unnecessary to determine whether the transcript would be admissible in a court under common law principles. However, we would note that admissions made by a party have traditionally been regarded by the courts as admissible at the instance of the opposite party as an exception to the hearsay rule. The weight to be given to such evidence depends upon a number of factors, including the solemnity of the occasion on which it was made. While such admissions need not be made under oath to be admissible, the fact that the alleged admissions were made under oath in a County Court trial at which Mr. D'Andrea was represented by counsel are factors to be taken into account in determining the weight to be given to such evidence. Those factors also highlight the absence of any prejudice to Mr. D'Andrea or Local 1089 in the Board's acceptance of this transcript into evidence. Moreover, if Mr. D'Andrea feels that any admissions contained in that transcript should be qualified or explained in some manner, it is open to him to testify before the Board in the present case.

Respondents' counsel also relies upon section 13 of the *Canadian Charter of Rights and Freedoms* in support of his contention that the transcript in question is inadmissible. That section provides as follows:

A witness who testifies in any proceedings has the right not to have any incriminatory evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

Counsel relies upon the British Columbia Court of Appeal decision in *Re Donald and Law Society of Alberta* (1983), 2 D.L.R. (4th) 385, in support of his submission that section 13 applies to the present proceedings before the Board. That decision held that section 13 barred the Benchers of the Law Society of Alberta from admitting as evidence in disciplinary proceedings a transcript of evidence given by the appellant, a member of the Law Society, in a civil action. In reaching that conclusion, the majority of the Court indicated (at page 391) that "section 13 of the Charter should not be restricted to criminal proceedings but rather should be given a broader meaning extending its operation to any proceedings where an individual is exposed to a criminal charge, penalty or forfeiture" All three members of the Court noted that it was clear that in the proceedings before the Benchers, the member could be found "guilty" of a statutory offence and subjected to a penalty which could include a reprimand, fine, suspension or disbarment. By way of contrast, a section 89 complaint before this Board is not penal or quasi-criminal. Indeed, a prosecution arising out of an alleged offence under the Act can only be taken with the consent of the Board, granted pursuant to an application under section 101(1) of the Act. The Board has broad remedial authority under section 89 to fashion compensato-

ry remedies. However, section 89 does not empower the Board to impose a penalty (or forfeiture) on a respondent. See, for example, *Third Dimension Manufacturing Limited*, [1983] OLRB Rep. Feb. 261, in which the Board wrote, in part, as follows (at paragraph 30):

.... the Board has consciously refrained from allowing its remedial orders to become in any way punitive. (*Radio Shack*, [1979] OLRB Rep. Dec. 1220). As the decision in *Radio Shack*, as confirmed by the Court (*Sub. Nom. Re Tandy Electronics Ltd. and the United Steelworkers of America*) (1980), 30 O.R. (2d) (Div. Ct.) made clear, any relief by the Board on a finding of an unfair labour practice under section 89 of the Act must be compensatory and not punitive. As the Court observed at page 47 (O.R.):

So long as the award of the board is compensatory and not punitive; so long as it flows from the scope, intent, and provisions of the Act itself, then the award of damages is within the jurisdiction of the board.

Section 89 of the Act has, therefore, been consistently viewed by the Board, with the approval of the courts, as remedial and not punitive legislation. . . .

Indeed, this panel of the Board applied that very approach in the present case when on January 31st it denied a request by Mary Portis (then counsel for Mr. D'Alessandro) to amend his complaint to include a request for punitive damages.

Therefore, we find that section 13 does not preclude the admission of the transcript in question as it could not be used to "incriminate" the respondent Rocco D'Andrea, within the meaning of section 13, in these quasi-civil, compensatory proceedings. In this regard, we also note that the central thrust of the complainants' case is that the respondent trade union has contravened section 69 of the Act, which contravention, if established, might prompt the Board to order that the respondent trade union compensate the complainants for their losses. No such order could be made against the respondent Rocco D'Andrea for contravention of that section since section 69 can only be contravened by a trade union (albeit through the actions of its officers, officials or agents). Finally, we note that even if the transcript could not be admitted for the purpose of establishing quasi-civil liability on the part of the respondent Rocco D'Andrea or his employer, Local 1089, for contravention of the *Labour Relations Act* by virtue of section 13 of the Charter, that provision would not preclude its admission for the purpose of showing the Union's records pertaining to the operation of the hiring hall to be inaccurate or unreliable.

For the foregoing reasons, the Board will admit the transcript in question, subject to proper proof (unless such proof is waived by Mr. Minsky on behalf of the respondents in the interest of expediting these proceedings).

Counsel for the complainants submitted that the respondents' objection to the admissibility of the transcript is so hollow and specious as to be an abuse of the Board's processes for which the complainants seek solicitor and client costs in any event of the cause. We do not agree with that categorization, nor do we find anything in the circumstances to justify a departure from the Board's normal practice of not awarding costs.

2053-83-U Service Employees International Union, Local 183, Complainant, v. **Daynes Health Care Limited**, Earl Daynes, Respondents, v. Group of Employees, Interveners

Sale of a Business — Prior Board decision declaring respondent successor employer — Respondent refusing to recognize union or collective agreement despite declaration — Emrick decision holding successor obliged to hire predecessor's employees — Whether distinguishable where predecessor terminated employees and successor recruited new employees prior to sale

BEFORE: R. O. MacDowell, Acting Alternate Chairman, and Board Members W. H. Wightman and B. L. Armstrong.

APPEARANCES: *Naomi Duguid, Michelle O'Connor, Don Burshaw II and Carolyn Shaughnessy for the applicant; Michael Gordon and Earl Daynes for the respondents; M. Longworth for the interveners.*

DECISION OF R. O. MacDOWELL, ACTING ALTERNATE CHAIRMAN AND BOARD MEMBER B. L. ARMSTRONG; August 14, 1984

I

1. This is an unfair labour practice complaint filed under section 89 of the *Labour Relations Act* and alleging that the respondent employer ("Daynes") has contravened sections 50, 63, 64, 66, and 70 of the Act. The complainant union alleges that Daynes has totally repudiated its obligations under the Act and the collective agreement by which it is bound. It has refused to apply the agreement to employees in the bargaining unit; it has refused to pay the benefits required by the agreement; it has refused to hire, retain, or recall employees in the manner prescribed in the agreement; it has refused to acknowledge or deal with employee grievances alleging a breach of the collective agreement and, it has refused to acknowledge the effect of a Board decision dated September 15, 1983, declaring that Daynes is a successor employer under section 63 of the Act. The union argues that Daynes is willfully flouting the law, and has stated publicly that it will never recognize the union or the rights of the employees it represents. As a result, a large number of employees have been thrown out of jobs which they have occupied for years. These corporate decisions are attributed to Earl Daynes, the owner of the respondent, and the person who has effective control over the business. The union seeks a variety of remedies, including reinstatement and compensation for the employees whom, it says, have been wrongfully denied continued employment.

2. This is the latest in a series of proceedings between the union and Daynes, arising out of Daynes' decision to operate a nursing home business in Peterborough, Ontario. It is framed as an unfair labour practice complaint, and the parties were agreed that the Board has jurisdiction to deal with it on that basis, and to fashion an appropriate remedy should the union's allegations be sustained and the respondent's position be rejected. At the heart of their dispute, however, is the effect of section 63 of the Act, and the extent to which that section protects the rights of employees when the business in which they are working is sold to a successor employer. That question has several aspects:

- a) To what extent is a successor employer required to retain the employee complement of his predecessor?
- b) What weight, if any, should be given to the fact that the predecessor may have purportedly terminated their employment in contemplation of, or as part of, the sale transaction?
- c) Is it significant that prior to the sale the successor may have made efforts to recruit or assemble his own work force which he plans to use in the business?

These are the issues which the parties have put before the Board for its determination through the vehicle of this unfair labour practice complaint; and, for the time being, they are prepared to leave aside more general unfair labour practice considerations.

3. This is not the first time that questions of this kind have arisen. In *Emrick Plastics Inc.*, [1982] OLRB Rep. June 861, the Board held that a successor employer under section 63 of the Act did indeed have an obligation to retain his predecessor's employees unless those employees could be laid off or terminated in accordance with the terms of the collective agreement. The Board found that section 63 preserved the employees' right to trade union representation, their collective agreement, and, most important, their jobs — so long as those jobs were continued in the successor's operation. If a similar obligation obtains in the circumstances of this case, Daynes concedes that it must employ many of its predecessor's employees and compensate them for not doing so earlier. The union asserts that the *Emrick* view is equally applicable here. However, we should make it clear at the outset that the union also reserves its right to argue, in the alternative, that even if Daynes was not obliged, by law, to retain the services of the predecessor's employees, the *reason* why it did not do so is its antipathy to the complainant and its objection to hiring individuals formerly working in a unionized context. In other words, the union reserves its right to argue that the case is a "conventional" unfair labour practice, based upon anti-union animus.

II

4. The earlier section 63 proceeding and the Board decision of September 15, 1983, are obviously important events in the chronology of this case, since a number of the issues may turn on the practical effect of the Board's section 63 declaration. We should note, therefore, that notice of the earlier section 63 application was given not only to Daynes, but also to all of the employees who might be affected by the successor rights proceeding (i.e., persons in Daynes' employ who would be represented by the union and be governed by the predecessor's agreement, if the union's successor rights application was successful). The notices were posted in prominent places on Daynes' premises where they would most likely come to the attention

of the employees potentially affected. The notices set out the date and place for the hearing, its purpose, and the way in which individuals could intervene. None did so.

5. The present case was filed on December 2, 1983. The initial hearing was scheduled for January 5, 1984. On January 4, 1984, the employer filed a reply, identifying a number of employees whom the employer said were potentially affected by the proceeding. This late filing made it impossible to notify those employees (assuming, without finding, that they were legally entitled to notice); but, as it turned out, the hearing was adjourned for other reasons. Notice was subsequently given to the persons listed on the employer's reply. By decision of the Board dated February 17, 1984, the case was adjourned again, to permit counsel for certain employee interveners a further opportunity to prepare. The matter was eventually rescheduled for hearing on February 24, 1984, before the present (differently constituted) panel of the Board.

6. On February 24, 1984, all parties appeared before the Board with counsel, prepared to argue the case. At that hearing, however, for the first time, the respondent advised the Board that there might be still other employees whom it had not previously identified and who were not among the group of employee interveners who were at the hearing represented by Mr. Longworth. These other employees had not received *specific notice* of this proceeding, although they had received notice of the section 63 case which is really at the heart of the matter, and it was agreed that their representations would be identical to those of the respondent and the employee interveners who were present. In the circumstances, the parties were all agreed that rather than risk any further delay the Board should proceed to hear their arguments on the effect of section 63 and the earlier Board decision in *Emrick*.

7. At the hearing on February 24, 1984, the parties were agreed that it was not necessary to lead evidence. The material facts were agreed upon. The parties were further agreed that the Board could refer to, and rely upon, the findings in the earlier section 63 proceedings. Those decisions speak for themselves and need not be reviewed in detail. However, it may be helpful to sketch in some of the background.

III

8. For some years a company known as Balmoral Lodge Limited ("Balmoral") operated a nursing home at 293 London Street in the City of Peterborough. Balmoral Lodge was operated pursuant to a licence issued by the Ministry of Health under the authority of the *Nursing Homes Act*. The licence permitted Balmoral to provide care for 51 residents. Balmoral's service employees (i.e., laundry staff, housekeeping staff, dietary staff, nurses' aides, RNA's, etc.) were represented by the complainant union and were covered by a collective agreement.

9. The terms of the collective agreement are unexceptional. There are similar provisions in most collective agreements. Employees cannot be discharged without just cause. In the event of a layoff or a recall from layoff, employees' seniority must be considered. Employees on layoff must be recalled to available job openings before such openings are filled on a regular basis pursuant to the "job posting" procedure. New jobs or permanent vacancies in existing job classifications must be "posted" so that interested bargaining unit employees, with seniority, can apply. No new employees can be hired until all those laid off have been given an opportunity to return to work in accordance with the terms of the agreement. These are fairly typical collective agreement mechanisms designed to protect employee job security and allocate scarce work opportunities.

10. Earl Daynes, the owner of the respondent company, has been in the nursing home business for some time. He operates a number of nursing homes in Ontario. In 1982, he decided to expand into the Peterborough area. To this end, he entered into negotiations with Balmoral with a view to acquiring an undeveloped piece of property not far from Balmoral's existing premises, as well as Balmoral's licence to carry on a nursing home business in the Peterborough area. Without a licence Balmoral could not operate. Daynes hoped to erect a new building to be called "Riverview Manor" which would "fill the gap" when Balmoral decided to withdraw from the nursing home business. Balmoral residents would find accommodation at Riverview Manor.

11. At the time, Balmoral was having difficulties. Its premises on London Street required extensive and expensive renovation. There were good reasons to get out of the nursing home business, and Balmoral was quite content to sell its licence and the vacant land to Daynes, and to facilitate the transfer of the Balmoral residents to the new Riverview facility when it was constructed. It is perhaps indicative of Balmoral's difficulties that in February, 1983, the Ministry of Health insisted that the top floor of Balmoral be closed and 18 of the 51 Balmoral residents were transferred on a temporary basis to a local nursing home run by Extendicare. Eventually, most of the residents remaining at Balmoral would find their way to Riverview Manor, as would a number of the persons who had been transferred temporarily to Extendicare.

12. The negotiations with Balmoral were ongoing and over that period there were changes in the terms and timing of the transactions by which Daynes hoped to make Riverview a viable nursing home business. It is interesting to note that, in its early stages, the documents reflecting those negotiations referred to the acquisition of Balmoral's nursing home "business" (see the decision of the Board dated May 31, 1983 at paragraph 6 and the decision of the Board dated September 25, 1983 at paragraph 5). At this point there was no concern about that characterization of the transaction. Eventually, a satisfactory arrangement was negotiated between Balmoral and Daynes. However, from the point of view of Balmoral's employees, there was real concern. On April 28, 1983, they were given notice of the termination of their employment upon completion of the transaction, then expected to close in June. The arrangement between Balmoral and Daynes put their jobs in jeopardy. Their right to continued employment could well depend upon whether Daynes had acquired Balmoral's "business" within the meaning of section 63 of the Act, and whether the employees' collective agreement rights (including those contingent upon seniority) were enforceable against Daynes. Accordingly, the union applied to the Board for a declaration that Daynes was Balmoral's successor and continued to be bound by the collective agreement.

13. The first section 63 application was filed on March 18, 1983 and came on for a hearing before the Board on May 5, 1983. As in the present case, there was no real dispute about what had transpired to that date, or the way in which the transaction was expected to unfold. (See the decision of the Board dated May 31, 1983 now reported at [1983] OLRB Rep. May 632, at paragraphs 3 to 11.) The real question was whether section 63 would have any application — that is, whether it would amount to an acquisition by Daynes of Balmoral's "business" within the meaning of section 63. Daynes took the position that it would not be a successor employer and indicated that it intended to hire employees and conduct itself as if the Balmoral collective agreement had no application. The union took the position that if the transaction went through in the form and manner expected, Daynes would be a successor within the meaning of section 63 and the Balmoral employees would have a claim for continued employment in what was characterized as a continuation of Balmoral's business. However, the Board declined the parties'

request to make a preliminary ruling on the effect of a transaction which had not yet been completed. The Board observed:

12. The union and the respondent both acknowledge that, in some sense, this application may be premature because the transaction has not yet closed, the licence to run the Riverview Nursing Home has not been formally acquired, the employee complement has not been settled and none of the residents have actually been transferred. However, both counsel urge the Board to express a preliminary opinion on the question of whether, if the transaction unfolds as it is expected to do, it would amount to a transfer of a business within the meaning of section 63 of the *Labour Relations Act*. The union takes the position that it would. The respondent asserts the contrary. Both parties point out that the Board's opinion would be helpful to them in planning their affairs. From the union's perspective, it has a number of members who face the prospect of termination in June and who are anxious to know whether their collective agreement rights and hence claim to jobs at Riverview will be preserved. The employer is anxious to ascertain the parameters within which he can establish the employee complement and the terms and conditions of employment of the persons hired to work at Riverview. There is no indication that the employer would abort or alter the form of the transaction depending upon the Board's decision, but it is obviously, and understandably, interested in avoiding any potential liability associated with the legal uncertainty.

13. We are not unsympathetic to the parties' concerns, but we have concluded that we should not express any opinion or make any determination about the application of section 63 until the transaction said to constitute a transfer of a business has been completed. Any desire to provide guidance to the labour relations community in a difficult area of the law must be tempered by a recognition that preliminary opinions based on hypothetical facts could create as much mischief as they resolve, if not more. Not only would such opinions encourage a rescission or restructuring of transactions to which section 63 might otherwise apply but, in addition, there could be litigation about the effect of the opinion itself and whether the transaction was actually consummated in the form upon which the Board's opinion was based. Since close cases will often turn on subtle shadings of fact, in our view, it would be unwise to render opinions on what will inevitably be less than complete information. In today's volatile business climate there is a real likelihood that various components of "the deal" will change (for example, to accommodate financing or licencing requirements) between its initial conception and its completion, and we are by no means convinced that the injection of a preliminary Board opinion at one stage or another in this process would really facilitate the promotion of orderly collective bargaining or the interest which section 63 was designed to protect. Finally, we are constrained to note that section 63 is not the only provision of the Act which occasionally gives rise to interpretive difficulties. The same could be said of the duty to bargain in good faith, the so-called statutory freeze (see section 79), and certain of the unfair labour practice provisions. It is an unfortunate fact that, like other areas of the law, the law regulating employer-employee relations has become increasingly complex and in many

cases there is room for argument about how the law should be interpreted or applied. However, we do not think that the answer to this complexity or to the business planning problems faced by the labour relations community lies in this Board giving preliminary opinions on hypothetical fact situations.

14. For the foregoing reasons, we have determined that this application must be dismissed as premature. Such dismissal, of course, is without prejudice to either party bringing a fresh application at an appropriate time in the future.

14. The transaction proceeded more or less as planned — although the closing date was postponed from June until August and the employees were not terminated as anticipated in the April 28th notice. They continued to work at Balmoral as before. However, in view of the earlier proceedings, the parties were agreed that immediately upon completion of the deal, a new section 63 application would be made. That application was filed in July in anticipation of an expected August 1st closing. The hearing was adjourned to August 25th, when it became apparent that, once again, the transfer would have to be postponed, and would not actually be completed until mid-August.

15. Between the dismissal of the first section 63 application on May 31, 1983, and the hearing of the second one on October 25, 1983, Daynes elected to proceed as if it had no special responsibility to consider the claims of Balmoral employees or their trade union. In June, 1983, Daynes advertised for, and received, applications for positions at Riverview Manor. To protect themselves, most of the Balmoral employees applied for those positions — even though the union continued to maintain that they should not have to “apply” for “their own jobs”. By July 16th, Daynes had selected those individuals whom it wished to employ. These included a few employees already working for Balmoral, a few individuals already employed in other Daynes’ facilities, and a much larger group of persons hired “off the street”. Daynes was aware, of course, that there would shortly be a second successor rights application. Daynes was also aware of the union’s claim that Daynes was acquiring and carrying on Balmoral’s nursing home business, and that Balmoral’s employees had a preferred right to the work opportunities generated by that business. Daynes was taking a risk that its legal position would not be sustained before the Board. Daynes was prepared to take that risk.

16. Between Tuesday, August 9 and Friday, August 12, 1983, Daynes conducted a paid training programme for the individuals whom it had selected to work at Riverview. The construction of the Riverview facility was completed on August 10, 1983. On Thursday, August 11th, the Riverview premises were inspected by an official of the Ministry of Health who indicated that, subject to a later inspection, the Riverview premises were satisfactory and that a transfer of residents from Balmoral could begin. The Ministry issued a “licencing status” document to this effect, over the signature of one of its officials. However, no formal licence was issued at that time. Between Monday, August 15th and Wednesday, August 17th, residents were transferred from Balmoral to Riverview. For this short period, both Balmoral and Riverview were providing nursing home care to some of Balmoral’s residents or former residents.

17. The terms of the transaction with Balmoral were not fulfilled until all of the residents had been transferred. That condition was met by August 17th. Riverview’s licence was issued on August 17th. The final aspects of the transaction closed on August 18, 1983, with the

registration of a mortgage in favour of Balmoral. Balmoral's licence expired on August 18, 1983. From that date forward, Riverview was fully operational and Balmoral ceased to carry on business.

18. On August 25, 1983, the Board (differently constituted) held a hearing to determine whether there had been a transfer of a business from Balmoral to Riverview within the meaning of section 63 of the *Labour Relations Act*. The Board heard the parties' evidence and representations, and reserved its decision. In a decision dated September 15, 1983, (now reported at [1983] OLRB Rep. Sept. 1564) the Board reviewed the details of the transaction as well as the policies and principles underlying section 63. The Board concluded that the respondent was a successor employer within the meaning of the Act. Board Member J. D. Bell dissented. A request for reconsideration of this decision was considered and dismissed. There was a subsequent application for judicial review. There has been no application to the Court for a "stay" or other interim relief. The decision of the Board speaks for itself and the details of its reasoning need not be reproduced here.

19. The Board decision of September 15th did not alter the respondent's stance. The respondent did not accept the section 63 declaration. The respondent did not acknowledge the collective agreement or apply its terms to the employees working at Riverview. The respondent did not recall or reinstate any former Balmoral employees. When those employees filed grievances under their collective agreement, asserting that their seniority (etc.) entitled them to continued employment, the grievances were ignored. The respondent did not process them. The respondent sought judicial review of the Board decision. The union filed this complaint.

20. With this background then, we turn to an examination of section 63 and its consequences — assuming, as we must, that there has already been a final and binding determination by another panel of the Board that Daynes is a successor employer within the meaning of the Act. The correctness of that decision is not now in issue. This is not an appeal. The question before us (at this stage, at least) is the effect of a successor rights declaration, and the extent to which it enures to the benefit of the predecessor's work force, and bolsters their claim to continued employment in what has become the successor's business.

21. In order to appreciate the significance of these issues, it is useful to review the structure and purpose of section 63 of the Act. In undertaking this review, of course, we will not repeat the analysis which led the other panel of the Board to conclude that, in the circumstances of this case, there had been a "transfer of a business" within the meaning of section 63. As we have already noted, this is not an appeal. However, it may be useful to comment on section 63 generally, so that the parties' positions can be put in their proper perspective. As will be seen *infra*, the result in this case is not of interest only to the immediate parties, and the Balmoral employees who found themselves unemployed when Daynes decided not to retain them. There may be broader ramifications, potentially touching the rights of the predecessor's employees in every sale transaction. The main provisions of section 63 are as follows:

[Sections 63(1) to 63(6) inclusive omitted]



IV

22. When a business, or “part” of a business, is transferred or disposed of, the transferee acquires it subject to the collective bargaining obligations of his predecessor. The union retains bargaining rights for the employees in a “like unit” to that which existed before, and the successor must continue to apply the collective agreement (if any) to that unit of employees until the Board otherwise declares. Section 63 creates a legal regime which is quite different from what would obtain in an ordinary commercial context, and the employees’ collective bargaining rights are not merely contractual. Since the bargaining structure inherited from the predecessor may be inappropriate, or create conflicts with the successor’s pre-existing bargaining obligations, the Board has certain powers to define and, if necessary, restructure the unit to suit the new circumstances. Likewise, if the successor employer significantly alters the character of the business, or intermingles the employees of the purchased business with those from its other operations, the Board may redefine the bargaining structure or determine whether the union’s bargaining rights should be continued at all (see sections 63(4)(6).

23. The principal thrust of section 63 is to preserve the labour relations *status quo*, by transforming the employees’ collective bargaining rights into a form of “vested interest” which attaches to the business entity and like a charge on property “runs with the business”. To accomplish this objective, the statute gives an unusual and extended meaning to the term “sale”, envisages the continuation of bargaining rights even in a “part” of the predecessor’s operation, abrogates the notion of privity of contract, and virtually eliminates the significance of the separate legal identity of the new owner. Collective agreements are not treated like ordinary commercial contracts, nor are collective bargaining rights co-extensive with commercial ownership. Both rest ultimately on the statute itself, which also ensures that they will “flow through” the business transfer and bind the transferee as if he had been an original party to the collective bargaining relationship. Thus, it is up to the prospective transferee to investigate the terms of the agreement its predecessor has made with his employees and take that into account in the terms of the acquisition. Here, of course, Daynes was well aware of this problem, since section 63 was raised long before the transaction finally closed. From the outset, the union has claimed that Balmoral employees, with the requisite ability and seniority, should be given preference to the jobs at Riverview.

24. The terms “sale” and “business”, have not been exhaustively defined in the Act, in recognition, we think, of the great variety of commercial relationships to which they might be applied, and the need for a case by case elaboration of the law in light of labour law policy considerations. In view of the broad language of section 63 and its intended remedial thrust, the Board has always been disposed to give section 63 a liberal interpretation. The Board has not placed much reliance on the legal form which the business transfer happens to take as between the predecessor and successor. Nor has the Board been unduly influenced by the assertion that there has merely been a “transfer of assets”. It is recognized that one can acquire a “business” just as surely by an asset transfer as by an acquisition of shares. On the other hand, not every commercial disposition or transfer of “something” will trigger section 63 and result in a continuation of bargaining rights. The task faced by the Board in any particular case is to give the statute an interpretation which is consistent with its language and intent, and is also fair to the labour relations and commercial context under review.

25. Over the years there have been numerous successor rights decisions, as the Board has sought to apply section 63 in different industrial contexts. In most of those cases (as here, initially) the question has been whether the commercial transaction is one to which section 63 applied. In resolving that question, the position of the employees is only one factor to be considered. A decision not to retain the predecessor's employees cannot, in itself, avoid the application of section 63, nor does the hiring of some of the predecessor's employees, in itself, determine the "sale" issue. However, as might be expected in a labour relations statute, the Board does pay particular attention to the nature of the work performed in the business before and after the alleged transfer. The trade union represents certain work groups, the collective agreement regulates the conditions of work for employees in those work groups, and the purpose of section 63 is to preserve both the bargaining relationship and the collective agreement. If the work and jobs performed subsequent to the transaction are similar to the work and jobs performed before, this would usually be one factor supporting an inference that there has been a "sale" of a "business" to which the *Labour Relations Act* should apply. In *R. v. B.C. Labour Relations Board ex parte Lodum Holdings Limited* (1969), 3 D.L.R. (3d) 41 Dyer J. observed:

One must keep in mind that the problem before the Labour Relations Board was one of labour relations and consequently, though as pointed out above the whole law must be considered, the weight to be assigned to various factors and the inferences to be drawn from certain evidentiary facts are not necessarily the same as would be the case if the problem were one of, say, taxation or control of assets. *The importance of the "business" in its labour relations aspect is the jobs it provides for the employees.* One factor to be considered therefore, is whether the same or substantially the same jobs are being performed. That depends on a number of factors such as whether the jobs are being performed at the same or substantially the same times and places, in respect of the same or substantially the same goods or services, and for the same or substantially the same customers or patrons, etc. These matters are, in my opinion, more important than the form of transfer.

[emphasis added]

Unless there is a continuation of the work and jobs, it would make little sense to preserve the union's bargaining rights and the employees' collective agreement. Conversely, if the work, the jobs, the bargaining rights and the employees' collective agreement are all continued, would it not be anomalous if a successor could reject all of those employees, and completely fill the bargaining unit with strangers of its own choosing? That is the respondent's position in this case. If accepted, it would substantially blunt the apparent remedial thrust of section 63. Now, obviously, the consequences of a particular interpretation cannot be permitted to confute the clear meaning of a statute; but the Board would be remiss if it did not consider which of two competing interpretations urged upon us seems to be most consistent with the statutory scheme and intent.

V

26. Because the legislation has confided successor rights determinations to the exclusive jurisdiction of the Labour Relations Board, the Ontario Courts have not had much occasion to comment upon the meaning of section 63. But there is one recent exception which deserves brief mention. In that case, the Court confirmed the broad remedial thrust of section 63 and

the special status which the statute accords to collective agreement rights. And there too, the focus of the Courts was on the rights of *employees* vis-a-vis the successor employer.

27. In *Re United Brotherhood of Carpenters and Joiners of America, Local 3054 and Cassin-Remco Ltd. et al.* (1979), 105 D.L.R. (3d) 138, the business of Cassin-Remco had been sold, through a receiver, to a company which this Board found to be a successor employer under section 55 [now section 63] of the Act (see *Re Fashion Crafts Kitchens Inc.*, [1979] OLRB Rep. Oct. 967). Prior to the sale, an arbitrator had found the predecessor, Cassin-Remco, liable in damages for certain breaches of the collective agreement, and the issue before the Court was whether the successors ("ASSAF" and "Fashion Craft") "inherited" responsibility for those arbitration awards — awards which, we repeat, were based upon breaches of the agreement committed by the predecessor, Cassin-Remco, *prior* to the sale. The Court held that the successors were liable because the Act put the successor in the same position as the original signatory of the collective agreement. Thus, the employees were entitled to pursue their claim against the successor. Steele J. observed:

I am of the opinion that the *Labour Relations Act* creates a special status for collective agreements outside the purview of the general law.

Section 55 [now section 63] of the *Labour Relations Act* provides that the purchaser of a business shall be deemed to be the original signatory to the collective agreement. Therefore, both the union and the purchaser are bound by the terms of the agreement including its benefits and detriments. A benefit may be wage rates differing from those prevailing in the industry. A detriment may be an outstanding grievance or, in this case, an execution filed as a result of an arbitrator's award. In other words, the terms and conditions of a labour agreement flow with the business and once the purchaser has acquired the business then he is obligated to all of the matters that are included with it.

In this case, the purchasers are liable as a party to the award and, by reason of Rule 546, it is appropriate that the order go granting leave to issue execution against Assaf and Fashion Craft in the amounts set out in the writs of execution against Cassin-Remco Limited including interest as specified therein from October 17, 1978.

To hold otherwise would frustrate the intent of the *Labour Relations Act* and would impede the processing of grievances that are ongoing within a collective agreement. It would mean that while companies were in financial difficulties, no grievances under the agreement would be pursued because there would be a danger that any decision resulting therefrom would be nullified by a subsequent sale of the assets whereas if the grievance were not filed until after the sale then the usual results would flow from it.

We are obviously not concerned about a precise point of insolvency law. What is interesting from our perspective is the Court's recognition that section 63 is designed to protect the rights of the predecessor's *employees* and requires the successor to recognize their pre-existing collective bargaining claims. (See also: *Maritime Life Assurance Co. v. Chateau Gardens (Hanover) Inc. et. al* 83 CLLC ¶14,070.)

28. As we have already mentioned, the position taken by Daynes in this case is very similar to the one taken by the respondent employer in *Emrick Plastics Inc.*, [1982] OLRB Rep. June 861 — so similar, in fact, that counsel for Daynes conceded that Daynes' position could not be sustained unless Emrick were distinguishable or this panel of the Board was persuaded to reject the Emrick reasoning. In Emrick the predecessor company was in financial difficulties and its business was ultimately sold through the offices of a receiver-manager. The successor's offer to purchase was accepted on February 5, 1982, and the deal eventually closed on or about March 1, 1982, when the successor formally took over the operation. In the interim, the successor interviewed a number of the predecessor's employees, who were advised that they would be notified later if the successor decided to hire them and if they should report for work on March 1st. There was some question whether these individuals had been properly terminated by the predecessor, but the more critical question addressed by the Board was whether the obligations of the successor did, indeed, turn on the actual or purported termination prior to the sale of the individuals employed by the predecessor. The successor insisted that it was under no obligation to hire any of the predecessor company's employees, and that the seniority and service of those employees that it did hire, dated only from the point of such hire. The successor asserted that it was under no obligation to apply the terms of the collective agreement to any of the predecessor's employees until such time as it actually decided to hire them, and that even then, they were entitled to no credit for their accumulated service or seniority with the predecessor.

29. The Board disagreed. After reviewing some of the authorities relied upon by the respondent, the Board concluded:

16. Nowhere in the *Kelly Douglas* decisions [[1974] 1 C.L.R.B.R. 77] did the B. C. Board suggest that a successor employer was free to select its employment complement free from the provisions of the governing collective agreement. On the contrary, that Board in *M. M. Pruden*, *supra*, [[1976] 1 C.L.R.B.R. 138] stated, at page 143:

...On the other hand, it is implicit in s. 53, and in the reasoning of Chairman Weiler in *Kelly Douglas*, that any discontinuance of employment must be for a legitimate business reason. That is, it must be for "just cause". A successor employer must continue to employ those employees whose jobs survive a succession under the Code, notwithstanding its opinion as to their suitability for continued employment. In other words, the Code should not be interpreted so as to give successor employers a licence to weed out "undesirable employees".

The Board's ultimate decision in *Pruden* was quashed on an application for judicial review, but only because the Court found a repugnancy between section 53 of the Labour Code and the overriding *Assessment Authority of British Columbia Act*, a piece of special legislation passed to govern the specific transaction before the Board in that case. Indeed, it was precisely the passage quoted above from the Board's decision which satisfied the Court of the repugnancy between the normal impact of section 53 of the Code and the special provisions of the *Assessment Authority Act*, which explicitly granted the new Authority the discretion to designate those employees whom it wished to hire.

17. The interpretation given to its successorship legislation by the British Columbia Labour Relations Board makes eminent good sense to this Board as well. Collective bargaining legislation is designed primarily for the benefit of employees, not trade unions. Can it really be said that the Legislature in enacting section 63 of our own Act intended that the rights of the bargaining agent selected by the employees would “run with the business” (cf., for example, *Marvel Jewelry*, [1975] OLRB Rep. Sept. 733), that the collective agreement bargained for and ratified by those employees would run with the business, but that the very employees who had made these choices would not? The Board would need unmistakable language in its statute to come to that conclusion. . .

18. We conclude, similar to the British Columbia Labour Relations Board, that section 63(2) of our own Act continues the effect of a collective agreement over a sale transaction *without hiatus*, and that the purchaser stands literally in the shoes of its predecessor with respect to any rights or obligations under that agreement. The purchaser, in other words is given no opportunity to “weed out undesirable employees” contrary to the provisions of the collective agreement, nor to decline to recognize any of the seniority or other rights accrued by employees under the collective agreement than the vendor would have been. The obligations of neither employer are determined by whether the employer on its own chose to treat a severance at a given point in time as a termination or a lay-off.

The complainant union asserts that the *Emrick* reasoning is equally applicable in the circumstances of this case and Daynes was obligated to retain the Balmoral employees.

VI

30. There is no lack of clarity in the Court decisions, or in the decisions of the Board, or, indeed, in the statute itself. Section 63 requires a successor employer to recognize the trade union that represents the predecessor’s employees, and to apply the terms of the collective agreement to the bargaining unit until the Board otherwise declares. Here, despite a Board declaration of successor status, the respondents did neither; and, given the course of proceedings, it can hardly be said that Daynes was unaware of its potential “exposure” or liability. The Board decision of September 15, 1983 stands until set aside by the Court, and the mere filing of an application for judicial review does not alter the result or suspend the effect of the statute which, by its terms, operates until the Board otherwise declares. As of the date of this decision, the application for judicial review has still not been perfected, and there has been no application for a “stay” or other interim relief. Accordingly, it is difficult to understand Daynes’ refusal to recognize the union or the collective agreement — quite apart from the merits of its argument respecting its obligations to the predecessor’s employees, and its chagrin at losing what even the Board regarded as a difficult case. However, because of the way this case developed, counsel for the respondent did not seek to justify the respondent’s repudiation of the collective agreement, the employees’ grievances, or the union’s position as bargaining agent. Rather, his argument centred on the corporate respondent’s obligation to retain in its employ the individual workers employed by Balmoral, the predecessor employer under section 63. If such obligation flowed naturally from section 63, the employees of Balmoral would have to be retained, and it is unnecessary to consider whether Daynes’ refusal to retain them constitutes an independent unfair labour practice.

31. Daynes argues that section 63 might require a continuation of the union's bargaining rights, and the terms and conditions of employment for bargaining unit employees, but there is no guarantee that any of the predecessor's employees will continue to keep their jobs in the bargaining unit. There was no obligation to give any special consideration to the predecessor's employees and, in fact, none was given. Of the many Balmoral employees seeking work at Riverview, only three or four were hired. Approximately 19 "new employees" were hired "off the street". The rest of the employee complement is composed of individuals transferred from other Daynes operations. Daynes asserts that in the circumstances of the instant case, it was entitled to meet its staff requirements by hiring employees entirely of its own choosing — whether or not they previously worked for Balmoral. The Balmoral employees were given notice of termination and the Riverview employees were assembled prior to the actual completion of the "sale" transaction. Daynes argues that there is no right to displace the "pre-existing employees" whom it selected to work at Riverview prior to the actual closing of the deal. Daynes argues that *Emrick* is distinguishable because, in this case, there was a period prior to the completion of the transfer when both facilities were operating simultaneously.

32. The union points out that Daynes has never applied the terms of the collective agreement to any of the employees at Riverview, whether they were former employees or new hires. In practice, Daynes has conducted itself as if section 63 and the collective agreement had no application whatsoever. In the union's submission the collective agreement required Daynes to give special preference or consideration to Balmoral employees and the respondent has clearly refused to do so. That is what *Emrick* stands for. The union submits that it is implicit in the scheme of section 63 of the Act that, if the collective agreement and bargaining rights "flow through", there must also be a continuation of the employees unless the employees are discharged or laid off in accordance with the terms of the collective agreement. Even if there were employees in place prior to the sale, the union submits they were temporary or probationary employees with no seniority, who should have been laid off immediately when there was insufficient work for Daynes' work force — a work force which, by operation of section 63, included the Balmoral employees.

VII

33. In answering this question, we should begin by reiterating that we are not here dealing with the employees' common law rights; but rather employee rights established in a collective bargaining regime, embodied in a collective agreement, and founded ultimately upon the statute. The law of master and servant no longer obtains, nor can an employer rid itself of unwanted employees, without cause, upon the mere giving of notice. In *Port Arthur Shipbuilding Co. v. Arthurs* [1967], 2 O.R. 49 (C.A.), Laskin, J.A. (as he then was) put it this way:

Matters familiar in a master and servant context have taken on different dimensions under collective agreements. . . . In all the understandable concern about union-management relations as reflecting in part an economic struggle between two giant forces, it is sometimes forgotten that collective bargaining and the collective agreement have given the individual worker security of continuing employment, depending by and large only on his seniority in relation to the employer's production needs (in terms of numbers of workers and their skills) and on his good behaviour which avoids giving just or proper grounds for discharge. What are generically called seniority and discharge clauses represent the employees' charter of employment security; and it is reinforced by removing from the employer, not his

initiative in acting against an employee, but his previously unreviewable right to rid himself of employees, even if it cost money damages to do so.

It is precisely this body of employee rights which the Legislature has decreed should "flow through" a "sale" transaction and bind a successor employer. To clarify what this means in the instant case, we must necessarily trespass, a little, on the territory usually occupied by an arbitrator.

34. When Balmoral gave its employees notice of termination, that notice did not effect a termination of their employment. It could not do so, because Balmoral was not entitled to discharge its employees unless it had "just cause", and no just cause was asserted, other than the impending sale, and the possible desire of Daynes to take over the business free from the incumbrance of Balmoral's employees. But, in our view, that is not just cause for discharge under the collective agreement when the business is to be continued in the hands of the successor, there is no real change in the character of the work, and both the collective agreement and the bargaining rights are preserved. Section 1(2) of the *Labour Relations Act* provides that an individual does not cease to be an employee by reason only of his being dismissed by his employer contrary to the terms of a collective agreement. Section 50 gives the agreement statutory force and section 63 makes it binding upon Daynes. Thus, the employees purportedly dismissed by Balmoral have a valid claim to continued employment which they are entitled to assert against Daynes, just as the employees in *Cassin-Remco* and *Maritime Life Assurance, supra*, were able to pursue their claims against successor employers in those cases.

35. When Daynes acquired the business, it stood precisely in the shoes of its predecessor. It inherited an established complement of employees with established contractual rights. Some of these employees were on layoff and had recall rights which they could assert before there could be any new hires. More importantly, there was a much larger group of employees who had been actively employed right up to the date of the sale. Those employees were not, and could not have been, terminated without just cause — which cause could not be based solely on the impending sale. Nor could they be "laid off" from their jobs when those jobs and their work continued. If it were otherwise, the purpose and intended effect of section 63 would be substantially undermined. Employees with years of service and a legal stake in the predecessor's business could be cast aside by the simple expedient of having the predecessor employer purport to terminate them prior to the sale and having the successor pre-assemble a work force of "new" employees with no established contractual claims (e.g. seniority) and no previous contact with the union. It does not take much imagination to foresee the likely result of packing the bargaining unit with strangers adverse in interest to both the union and the predecessor's employees who could rely upon their seniority in the competition for scarce work opportunities. In practice the protections of section 63 would be illusory and short lived. As the Board put it in *Emrick*: could the Legislature have intended a continuation of the union's bargaining rights for a group of employees and the continuation of the employees' collective agreement, but not those employees' own right to continued employment in accordance with the terms of their agreement? Could the Legislature have intended the preservation of bargaining unit rights in the abstract, but not the protection of the positions of the members of the bargaining unit who might be able to benefit from or exercise those rights? Certainly that would be a perverse result and one which we would not lightly embrace. This is not to say that a successor employer cannot reorganize its work force, introduce new methods, or even trim the employee complement — provided it does so in accordance with the terms of the collective agreement. But the successor's rights are limited in precisely the same way as the rights of the predecessor.

36. Does the purported recruiting of the Riverview staff prior to the business transfer make any difference? Daynes asserts that its employee complement was assembled and in place prior to the sale transaction which, by its terms, could not have been completed until all of the residents had been transferred to the Riverview facility on August 18, 1983. The "new hires" were undergoing a training programme and being paid from August 9th onwards. For at least a few days, they were already working for Daynes, and, at that point, most of the Balmoral employees were still actively at work in the Balmoral premises and remained so until the transfer was completed. Daynes maintains that Riverview was fully staffed prior to the sale. There were no job openings. At the highest, the Balmoral employees may have a claim to recall to future openings if there are any.

37. This submission misconceives the effect of section 63 and its interplay with the terms of the collective agreement (leaving aside, for now, the fact that the employer refused to acknowledge or apply that agreement in any event).

38. When the sale of a business occurred, the Balmoral employees did not revert to the status of "laid off employees" or employees who had been properly terminated. They were actively employed by Balmoral until its business had been completely transferred to Daynes, and, upon the acquisition of Balmoral's business, they became employees of Daynes with full seniority rights and a claim to any work opportunities then available. Their status as employees in the bargaining unit did not change, and Daynes had no more right to change it than its predecessor had. Nor does it matter that, in reality, the actual acquisition of Balmoral's business took place in stages over a three-day period, as Balmoral gradually withdrew from the business of providing nursing home care to its residents, and Daynes gradually assumed that responsibility. Notionally, this means only that Daynes gradually acquired parts of Balmoral's business and by August 18, 1983, it had finally acquired the whole. That could not affect the rights of Balmoral employees who, as the transfer of business unfolded, became employees of Daynes. The Balmoral employees could not be discharged without just cause, and if Daynes suddenly found itself with too many employees for the available work, it was required to reduce its work force in accordance with the layoff provisions in the collective agreement, taking into account the seniority rights of all of its employees.

39. In contrast, if the individuals selected by Daynes to work at Riverview can be considered employees of Riverview prior to the transfer of Balmoral's business (and, it might be argued that they were merely "prospective employees" until then), they were certainly not employees *in the bargaining unit* until the transfer actually occurred. At that point, they would become employees in the bargaining unit and subject to its terms. But one of those terms was that newly hired employees would not go on the seniority list and would not be credited with seniority under the agreement until after they had completed a three-month probationary period of employment. Even the most generous construction of the agreement would appear to give the new hires only a few days of seniority, and it can plausibly be argued that until they had completed the stipulated probationary period, they had no seniority under the agreement at all. Accordingly, only the most exceptional of circumstances would justify the preference of these new hires over individuals having experience in the job classifications continued at the Riverview facility and having established seniority under the terms of the collective agreement. No such exceptional circumstances were identified by the respondent; thus if the respondent had applied the agreement as it was required to do, most, if not all, of the Balmoral employees would have been retained. In the competition for the limited employment opportunities available, the new hires simply would not have prevailed. If Daynes had complied with its contractual

and statutory obligations, rather than ignoring them, the bulk of the Balmoral employees would be working at Riverview today.

40. The position of the *long-term* Daynes employees transferred to Riverview from its other locations may raise different considerations under the collective agreement with respect to the effect (if any) of their previous service with Daynes outside the bargaining unit, and whether under the terms of the agreement (and absent anti-union animus), they would be in a better position than the new hires and the previous Balmoral employees in the competition for limited work opportunities. But we need not address that matter at this stage, nor do we have to consider, in detail, how (again, absent alleged anti-union considerations) the agreement should have been applied to particular individuals with particular claims to jobs at Riverview. It suffices to say that we do not think this case is distinguishable from *Emrick*, and, accordingly, that the respondent had a *prima facie* obligation to retain the predecessor's employees who could only be terminated or laid off in accordance with the terms of the collective agreement.

41. In view of the foregoing, the Board will remain seized in the event that the Board's opinion does not resolve the issues remaining between the parties, and it is necessary to continue with this case.

DECISION OF BOARD MEMBER W. H. WIGHTMAN;

1. In the earlier case (Board File No. 0927-83-R) Board Member J. D. Bell dissented from the majority and would have found that a sale did not occur. I agree with my colleague and would stress that the problem the Board faces in the case at hand results from attempting to pursue the illogical premise created by the earlier case to a logical conclusion.

2. The plight of all parties involved in this matter should be viewed in the context of all the events dating back to October of 1982 when Daynes purchased some land from Balmoral in anticipation of Balmoral losing its licence to operate a nursing home. We are entitled, I think, to take judicial notice that nursing homes have little control over income (the amount paid per patient per day being fixed by government) or a substantial portion of their costs (bargaining unit rates of pay being determined through interest arbitration). Balmoral had not allocated the differential between income and costs in such a manner as to have satisfied the licensing authorities with respect to the physical condition of the facility. Daynes assessed the situation and it is significant that they decided they could operate a nursing home in the locality but that to do so would require a fresh start using a new facility and their own policies and procedures. Though this would involve a major capital commitment, they were prepared to do so assuming they could operate it in the initial stages at least along the same lines they have been operating their other existing facilities. As mentioned in the majority award (para. 11), Daynes attempted to outline their intentions to this tribunal in hopes of getting what would have amounted to prior approval in a labour relations sense. In the decision of May 31, 1983 (Re File No. 2639-82-R), Daynes learned that the Board could not deal with a prospective question and notwithstanding failure to obtain pre-clearance from the OLRB, Daynes decided to proceed with what it thought to be a reasonable plan. Balmoral, knowing it was going out of business, gave notice of termination in accordance with employment standards legislation on April 28, 1983.

3. In June 1983 Daynes began interviewing prospective employees; (including persons then employed at Balmoral), anticipating staff requirements beyond those persons already in their employ whom they intended to transfer to the new facility.

4. On July 16, 1983 Daynes notified successful applicants for the new (Riverview) facility.
5. On August 9, 1983 Daynes engaged employees for Riverview and embarked on a training program for them which continued through August 12.
6. On August 11, 1983 the Ministry granted licensing status to Daynes for the Riverview Facility. It is significant that the Balmoral licence continued in existence concurrently. (For obvious reasons nursing home licences are not bought, sold, rented or leased in the fashion of taxi-cab plates).
7. On August 18, 1983 Balmoral's licence expired, the facility ceased operations and Riverview registered a mortgage in favour of Balmoral. Thus, upon completion of the transaction between Daynes and Balmoral, the Riverview Facility on August 18, had been staffed since August 9.
8. In its decision of September 15, 1983 the Board found the transaction to have been the sale of a business, and that Riverview had inherited Balmoral's collective agreement and concomitant obligations vis-a-vis the employment of personnel from the Balmoral bargaining unit. In the words of counsel for union: "Daynes took a chance — gambled and lost as of September 15th".
9. Daynes was not the only "loser". The public interest in residential nursing home care in this Province fared poorly as well, in that these decisions will reduce the likelihood of private interests being willing to provide the capital necessary to replace facilities which deteriorate in circumstances such as Balmoral. Inadvertently the Board may have pre-empted the Legislature and embarked upon a *de facto* public policy of Crown ownership of nursing homes.
10. Daynes employees transferred from other locations to Riverview, as well as persons hired directly at Riverview on August 9 also appear to be "losers". They will have known that as of August 11 they were employees of a nursing home, that they subsequently began receiving residents from a nearby home (August 15th to 18th), and that their jobs are now claimed by employees of the home from which they have received some of their residents. However, with this knowledge they may not be able to understand why they are not among the people referred to in the *Emerick* decision (*supra*), which opines that "Collective bargaining is designed primarily for the benefit of employees, not trade unions". (See page 21 of the majority decision). They may wonder how their circumstances would have been affected had they been represented by a competing trade union, or by another Local of the complainant union. Indeed, they may wonder if the Legislation is not being construed in such a manner as to suggest that employees not represented by a trade union are to be less favourably treated than those who are. Such a construction would surely fly in the face of Section 3 of the Act and the Charter of Rights guarantee of freedom of association both of which must implicitly guarantee an equal and concurrent freedom not to associate and not to be penalized for exercising that freedom.
11. It should also be noted that when this complaint came on for hearing the respondent offered to proceed immediately to expedited arbitration with respect to all grievances regarding employment entitlement. In light of the earlier decision regarding the "sale of the business", this seems to me to have been a wise and fair approach. By insisting that this Board resolve the matter the complainant has caused a denial of natural justice to at least some of the employees now employed at Riverview.

12. This decision may be a “logical” outcome flowing from the earlier decision but since its effect is to deny a freedom guaranteed under Section 3 of the Act, I must dissent.

0196-84-R; 0197-84-R United Brotherhood of Carpenters and Joiners of America, Local 93, Applicant, v. **Doran Construction Limited**, Taggart Construction Limited and Taggart General Contractors Limited, Respondents

Sale of a Business — General contractor deciding to wind up operation — successor company purchasing all equipment and engaging services of principals of predecessor — Sharing premises and hiring management and employees — Economic organization acquired constituting sale and not expansion of existing operation

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members J. A. Ronson and B. L. Armstrong.

APPEARANCES: *David Jewitt, Frank Manoni and Wilf Clermont for the applicant; Ronald Douglas Thomson for the respondent Doran Construction Limited; Robert M. Nelson, Russel W. Zinn, Jim Taggart and Dave Parkes for the respondents Taggart Construction Limited and Taggart General Contractors Limited.*

DECISION OF THE BOARD; August 28, 1984

1. These are consolidated applications under sections 63 and 1(4) of the *Labour Relations Act*.
2. The style of cause in this matter is amended by adding Taggart General Contractors Limited as a respondent in these proceedings.
3. It is conceded that the two Taggart companies named as respondents are related companies within the Taggart group, but that is not the issue here. The issue is essentially whether there has been a sale of the business of Doran Construction Limited to the Taggart group, within the meaning of section 63 of the Act.
4. At the material time Doran Construction Limited was owned and operated jointly by three principals: Mr. Thomson, an engineer, who was President and Chief Executive Officer; Mr. Kent, a surveyor, who was the main estimator for the company; and Mr. Carber, an accountant, who kept the books for the company. The company operated for a number of years as a general contractor in the construction industry, but in the latter period of its operation began to encounter financial difficulties, largely because of the size of a claim against one of its former customers which was tied up in the courts, and by May of 1983, its bonding had been cancelled altogether. The principals then set about to find other sources of financial backing, and Mr. Thomson approached Minto Construction Limited, a substantial residential builder in the City of Ottawa. The individual that Mr. Thompson approached at Minto indicated that the company would not be interested in investing any funds in Doran, but indicated that it was interested itself in getting into the general contracting field, and asked Mr. Thomson

if he would like to come and work for them. Mr. Thomson talked this offer over with his other two partners, and, with both of them being much closer to retirement than Mr. Thomson, and the prospects for further financing not being good for Doran, it was agreed that Doran would be wound up, and that Mr. Thomson would accept the Minto job offer, effective January 1, 1984. Mr. Thomson then advised his foreman to get the equipment of Doran ready for sale.

5. Doran and Taggart Construction Limited have always had business dealings together. One day at the end of September Mr. Thomson ran into Jim Taggart, one of the Taggart principals, in the parking lot of the Taggart offices while dropping off a cheque. Mr. Taggart asked Mr. Thomson in a casual way how things were going, and Mr. Thomson replied that things were not going well at all, and that in fact they were in the process of winding Doran Construction up. Mr. Taggart expressed interest at this development, and indicated to Mr. Thomson that he and his partners had recently decided to go into the general contracting business. Mr. Taggart suggested that the principals of the two companies get together to see whether they could not work out some arrangements that would be convenient to both of them.

6. That meeting did take place shortly thereafter, in October, between the three principals of Doran and the three principals of Taggart, being James Taggart, Ian Taggart and David Parkes. At that meeting essentially two things were agreed: Taggart would purchase as a package the equipment of Doran Construction, and the three principals of Doran would provide assistance to Taggart on a part-time basis for a period of one year, in order to, as Mr. Thomson put it, assist them in getting into the general contracting business. Mr. Taggart testified that his company had done a bit of general contracting work from time to time over the years, but that he still thought it would be advantageous to have available at this point the particular expertise of the Doran principals, and so took advantage of the opportunity. It was understood that the equipment of Doran would be valued on the basis of their 1982 book value for the purposes of the sale, being \$50,000 in total, and that the price to be paid for Doran for the services of its three principals would be \$75,000 in addition. Mr. Thomson testified that the transaction did not include the transfer to Taggart of any of Doran's contracts or customers, and added that in this industry, which operates 99% on the basis of the lowest bid, the transfer of such things would not be possible. He stated: "In this business, all of the contacts are *personal* — that's why Minto has me". Mr. Taggart testified that the purchased equipment went into a common yard for Taggart Construction Limited and Taggart General Contractors Limited but that the bulk of its use was by Taggart Construction. Taggart Construction Limited has been involved essentially in the sewer, watermain, and excavating sector of the construction industry, and Mr. Thomson testified that the bulk of what Doran sold to Taggart would be too small for the normal kind of work which Taggart Construction Limited did.

7. As it turns out as well, Taggart General Contractors Limited, the new company began with the assistance of the three Doran principals, shared office space for that first year with Doran Construction Limited itself. Mr. Taggart testified that he did not have enough space in Taggart's present offices for the additional business and so, agreed to take off Doran's hands approximately half of the space to which Doran Construction was under lease at its own location. The Taggart company will be moved to the main Taggart office when construction of addition has been completed. Mr. Thomson testified that Doran cannot be formally wound up until the judgment debt owing in Quebec has been collected, and that Doran has retained one employee in its office for the purpose of opening mail and answering the telephone. Taggart General Contractors Limited, now that it shares the space of Doran Construction Limited, also shares the use of that one employee. Mr. Thomson testified that it was a fair assumption that any

calls which now came in for the inactive Doran Construction Limited, would be referred by the receptionist to Taggart General Contractors Limited instead.

8. As agreed, the principals of Doran have been assisting the Taggart people to obtain contracts in the general contracting field. Mr. Thomson was active in helping them to take off costs and prepare estimates until mid-December and since that time the bulk of the help has come from Mr. Kent. At all times, of course, the decision as to which contracts to bid on, and the final figure to be entered on the bid, have been the decision of the Taggart principals. Mr. Kent, it will be recalled, was also the Chief Estimator for Doran, and is currently training a younger person in the Taggart organization to take over when the one-year period expires. Mr. Thomson, as a concerned employer, did what he could to assure that the various employees of Doran did not find themselves out of work, and a number of them have been hired on his recommendation by Taggart General Contractors Limited. These included a carpenter and job superintendent, Mr. Geick, as well as Doran's Project Manager, Mr. Chuchryk. A number of Doran's labourers went over to Taggart General as well, although the movement of rank-and-file employees is not significant in "sale of a business" terms.

9. Mr. Taggart was asked on cross-examination whether the members of the Ottawa Bid Depository and the Ottawa Construction Association would be generally aware that the principals of Doran were now participating in the preparation of tenders for Taggart General Contractors Limited, and Mr. Taggart answered that he assumed that they would be. To date Taggart General Contractors Limited has bid successfully on a number of projects for the Regional Transit Authority, and that is a customer for whom Doran Construction Limited has successfully bid in the past. Mr. Taggart testified that a primary interest of his group is in obtaining general contracting jobs which have a large sewer and watermain, or excavating component, which can be sublet to Taggart Construction Limited. Some of the projects successfully bid so far, however, do not involve such a component.

10. The Board has repeated many times that no simple test can be adopted to determine whether a "sale of a business" has taken place, and in particular that the relevant criteria will vary from industry to industry. In *Tatham Company Limited*, [1980] OLRB Rep. March 366, the Board commented at paragraph 26:

... Factors which may be sufficient to support a "sale of business" finding in one sector of the economy may be insufficient in another. In some industries, a particular figuration of assets — physical plant machinery and equipment — may be of paramount importance; while in others it may be patents, "know-how", technological expertise or managerial skills which will be significant. Some businesses will rely heavily on the goodwill associated with a particular location, company name, product name or logo; while for other businesses, these factors will be insignificant. The *Labour Relations Act* applies equally to primary resource industries, manufacturing, the retail and service sector, the construction industry and certain public services provided by municipalities and local authorities. In each of these sectors the nature of the business organization is different, yet in each case section 55 must be applied in a manner which is sensitive to both the business context and the purpose which the section is intended to accomplish.

Most often the question will arise where the purchaser of certain assets uses those assets in essentially the same kind of business as did the vendor, and the Board:

... must be careful to distinguish between the predecessor's "business" and a similar or parallel business which performs work of a similar nature.

See *Thunder Bay Ambulance*, [1978] OLRB Rep. May 467, at paragraph 13. The Board studies the facts, in the words of *The Tatham Company*, *supra*, at page 25, to determine

... the extent to which the various elements of the predecessor's business can be traced into the hands of the alleged successor;

or, as the Board put it in *Gordon's Market*, [1978] OLRB Rep. July 631, at paragraph 17, to decide whether the purchaser's business can be said to "take its life" from that of the vendor. As the Board went on in *Tatham*, *supra*:

If most of the elements that made up the predecessor's business organization can be found in the hands of the successor, and are used for the same business purposes, there is usually a strong inference that there has been a "sale of a business" to which section 55 applies.

11. Here the Taggart respondents argue that the business of Taggart General Contractors Limited clearly takes its life from Taggart Construction Limited, rather than from Doran Construction Limited. They describe the ability to be bonded as the "crucial" element in the general contracting business, and point to the fact that Taggart General Contractors Limited's ability to be bonded arose from Taggart Construction Limited. In addition, they argue, Taggart Construction itself had always been engaged to some degree in the general contracting business in conjunction with its main business of excavating, and what occurred was no more than an expansion under Mr. Parkes of its own general contracting business.

12. The Board does not agree. While bonding is unquestionably a *sine qua non* for carrying on this business, it is an entirely internal matter, and not one which distinguishes one business from another, or gives it a competitive advantage, *in its dealings with the public*. As for the argument that this was simply an expansion of the business that Taggart itself had carried on, the Board acknowledges that that is something which the Taggart group might have done. They might, in the words of Jim Taggart, have "muddled along", gradually building up the kind of expertise, recognition and "personal" contacts that Mr. Thomson and the other Doran principals enjoyed. But that is not what happened. The Taggart group saw an opportunity for a "short-cut", through the sudden availability of the Doran principals, and, as Mr. Taggart testified, they decided to take advantage of that opportunity. Thus the Taggart group acquired, for the critical period of their start-up at least, all of the built-up experience and familiarity of the Doran principals. That such were assets of considerable value even in an industry which operates 99 per cent on a "bid" basis is attested to by the price which the Taggart group themselves were prepared to put on them. If the allocation of the "purchase price" between the tangible and intangible assets of Doran reflected something other than the parties' assessment of their relative worth, no witness came forward to offer evidence in that regard.

13. The case does not, in fact, stop there. Apart from acquiring the services of the Doran principals and virtually all of Doran's equipment, the new Taggart company also began its life by operating out of the same premises as Doran, and sharing the same secretary. While walk-in trade is obviously not a factor in this business, this arrangement did mean that any calls coming for Doran with respect to new work could be, and, we are told, probably would be, redirected to Taggart. There was, in addition, a transfer of management beyond the three principals of

Doran, in the person of the Project Manager Chuchryk, and the job superintendent Geick. In *Tatham Company, supra*, the alleged successor acquired the excavating and grading machinery, the “key” employees, the office staff and equipment, the business location and the yard facilities of the Tatham Company. The Board found a “sale of a business” to have taken place, notwithstanding the fact that by the time the company came to be wound up, the business reputation of the Tathams could be said to have been a negligible or even a negative factor. The Board wrote, at paragraph 27:

The configuration of assets, know-how, managerial and employee skills which formerly carried on excavating business as the Tatham company is now, in substance, carrying on business as Magnus, and supplying precisely the same service to the same general market. There was very little which Tatham had, which has not been transferred, directly or indirectly to Magnus

In our own case, there were no “yard facilities” involved, but it was the services of the Doran principals themselves which were carried over into the new company, albeit on a limited-term basis. The comment of the Board above in *Tatham* appears every bit as applicable to the facts of this case. In our view, Taggart General Contractors Limited did in fact acquire from Doran, at least for the critical months of its “start-up”, “the economic organization which is used to attract customers or perform the work” (see *Metropolitan Parking Ltd.*, [1979] OLRB Rep. Dec. 1193, at page 44).

14. The respondents also rely upon the decision of the Board in *Rivard Mechanical*, [1981] OLRB Rep. May 550. There the Board emphasized the importance of the original principal’s personal experience and reputation in dealing with questions of a “sale of a business” in the construction industry. But in reaching its decision in that case, the Board also emphasized that the individual behind the vendor company J.G. Rivard Ltd., Jean-Guy Rivard himself, played no role whatsoever in the start-up or operation of the company which the persons formerly associated with him had spun off. Had the new company in the present case not had the transitional advantage which the one-year service contracts with the Doran principals gave to it, the result here might have been the same. But those are not our facts.

15. For the reasons set out, the Board concludes that a sale of the business of Doran Construction Limited has taken place to Taggart General Contractors Limited, and declares, pursuant to the provisions of section 63(2) of the *Labour Relations Act*, that Taggart General Contractors Limited was bound, as of the date of the sale, to the applicant’s collective agreement.

16. The Board has noted the relationship of Taggart General Contractors Limited to Taggart Construction Limited, for the purposes of the finding of a “sale” to the former, and that finding would appear to meet the applicant’s concerns in the present application. The evidence is that Taggart Construction and Taggart General Contractors are being carried on on a separate and discreet basis, and the Board sees no reason at the present time to extend the impact of the “sale” to Taggart Construction Limited by way of a “related employer” declaration.

1654-83-R United Brotherhood of Carpenters & Joiners of America Local 1256, Applicant, v. **Letham, Jarvela and Robertson Ltd.**, Respondent

Bargaining Unit — Certification — Construction Industry — Whether provincial agreement or *Apprenticeship and Tradesmen's Qualification Act* requiring use of term "registered" in describing apprentices in unit description — Prohibition against use of power saw considered in deciding employee employed as helper and not carpenter

BEFORE: N. B. Satterfield, Vice-Chairman, and Board Members F. W. Murray and W. F. Rutherford.

DECISION OF THE BOARD; August 2, 1984

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2. In this application for certification the applicant filed three combination applications for membership and receipts. The combination applications for membership are signed by the employees and the receipts are countersigned and indicate that a payment of \$1.00 has been made with the six-month period immediately preceding the terminal date of the application. The money was collected by one person. The applicant also filed a duly completed Form 80, Declaration Concerning Membership Documents, Construction Industry.

3. The respondent filed a reply, a list of employees containing three names on schedule "A" and specimen signatures within the time fixed in accordance with the *Labour Relations Act* and the Board's Rules of Procedure.

4. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on April 10, 1980, the designated employee bargaining agency is the United Brotherhood of Carpenters and Joiners of America and the Ontario Provincial Council of the United Brotherhood of Carpenters and Joiners of America.

5. The Board further finds that this is an application for certification within the meaning of section 119 of the *Labour Relations Act* and is an application made pursuant to section 144(1) of the Act which provides that:

An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause *e* of section 117 shall be brought by either,

(a) an employee bargaining agency; or

(b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in

at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection 3 or by voluntary recognition.

6. The applicant ("Local 1256") is seeking its traditional trade unit composed of carpenters and carpenters' apprentices. The appropriate unit proposed by the respondent in its reply is described in terms of carpenters and *registered* carpenters' apprentices (emphasis added by the Board). The reply and the lists of employees filed by the respondent indicated that there were three carpenters at work on the date of the application in the bargaining unit proposed by Local 1256. Local 1256 challenged the list of employees filed by the respondent. In view of those issues, a Board Officer was authorized to inquire into and report to the Board on the list and composition of the bargaining unit. The Officer made his inquiry, reported to the Board and copies of his report were sent in the usual manner to Local 1256 and the respondent. The solicitors for those parties subsequently made written submissions to the Board on what conclusions it should reach from the evidence in the Officer's report.

7. The Board wishes, before dealing with the report and the submissions thereon, to deal first with the issue raised in the reply with respect to registered carpenters' apprentices. The respondent's position is based on what it understands to be the requirements of the *Apprenticeship and Trademen's Qualification Act*, R.S.O. 1980 c. 24, and Ontario Regulation 570/76, section 2 (pursuant to that legislation). The respondent claims also that the carpenters provincial agreement contemplates only registered apprentices. What that agreement says about apprentices is simply irrelevant to the determination of the appropriate bargaining unit in this application. With respect to the *Apprenticeship and Trademen's Qualification Act*, the Board agrees with Local 1256's solicitors that persons in the general carpenter trade and employers of persons in the trade are not bound by those provisions of the *Apprenticeship and Trademen's Qualification Act* which caused the Board in *Ircon Roofing*, [1981] OLRB Rep. Nov. 1594 to describe the appropriate bargaining unit in that case in terms of registered apprentices. Thus, that Act is not cause for the Board to use the term "registered" with respect to apprentices when describing bargaining units for the carpentry trade. Therefore, there is no reason for the Board in this case to depart from describing the appropriate bargaining unit in terms of carpenters and carpenters' apprentices, the trade usually granted to the United Brotherhood of Carpenters and Joiners of America and its constituent carpenter locals.

8. The Board therefore finds, pursuant to section 144(1) of the Act, that all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the County of Lambton, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

9. The applicant is seeking to have the names of two persons, Roger Lauzon and Blaise Campbell added to the list of employees filed by the respondent. Local 1256 claims that Lauzon and Campbell were performing carpentry work on the date of application and therefore were employees in the bargaining unit described above. The respondent, at the time of the inquiry, was taking the position that they were not performing carpentry work, were not apprentices and, particularly, were not registered apprentices. Alternatively, if they were performing carpentry work on the date of the application, they were doing the work of construction labourers as well and spent the majority of their time while employed by the respondent on labouring work. Therefore, the Board should find them to be labourers and not carpenters.

Local 1256 is not claiming either person to be an apprentice and, through its solicitors has admitted that Campbell is not an apprentice. Local 1256 claims that Lauzon and Campbell were doing carpentry work on the date of the application and for a representative period before the date. Therefore, they were carpenters and employees in the bargaining unit.

10. The evidence in the officer's report reveals that Lauzon was hired on July 11th, 1983 as a labourer. He was paid \$6.50 per hour and worked as a labourer until approximately September 21st. By that date the project had reached the stage where the major part of the carpentry work involved was to begin. At or about that time Lauzon's wage rate was increased to \$10.00 per hour and he began to do carpentry work and continued to do that work at least until October 20th, 1983, the application date. He did the same kind of work as Gregory Delmotte who was hired by the respondent on October 5th. Delmotte was also paid \$10.00 per hour and his name appears on the list of employees filed by the respondent with respect to the application. His classification is given as carpenter and is not disputed. The evidence in the report of the work which they were performing establishes clearly that Lauzon was employed as a carpenter at the making of this application. Therefore, the Board finds that he is an employee in the bargaining unit described above.

11. The Board does not have the direct evidence of Campbell about the work which he was performing on the date of application because, at the time of the Board's inquiry, he was employed in Nova Scotia. The Board does have the evidence of the respondent's general foreman George Munt, who hired Campbell, as well as that of Lauzon and Gregory Delmotte. Campbell was hired by Munt as a labourer on August 10th, 1983. He did labouring work until he started to work with Lauzon. Delmotte was in a position to observe the work which Campbell was doing while he worked together with Lauzon. Campbell began working with Lauzon not later than September 28th and, except for a maximum of three days when he did some labouring work, he worked with Lauzon at least up to and including October 20th. Having reviewed the testimony recorded in the Officer's report of Lauzon and Munt, the Board is satisfied that the three days on which Campbell was doing labouring work after he began working with Lauzon did not include October 20th. The project on which they were working was a one storey office building, they worked together on the framing of interior and exterior walls, the installing of prefabricated roof trusses, installing slope wedges for the roof, laying sheathing for the roof and placing sheathing for the exterior walls. Campbell and Lauzon worked as a team in the same way that Delmotte and another person who is listed by the respondent as a carpenter worked together as a team. When the roof trusses were being raised and the roof's sheathing being laid the four of them were working on the roof together.

12. Campbell was not experienced at carpentry work and at first had to be shown by Lauzon how to do measuring accurately and how to cut. Cutting was done by power saw and the respondent's general foreman eventually told Lauzon not to do any cutting with the power saw because he was unskilled at that work. Because of his inexperience, Campbell did not do all of the carpentry work which Lauzon and Delmotte were doing. When Lauzon was framing walls, Campbell carried the lumber for him. He also shared with Lauzon the placing and nailing of the 2" x 6" wall studs. Campbell and Lauzon worked together with Delmotte and another carpenter in installing the prefabricated roof trusses and laying sheathing for the roof. On the latter work, Campbell laid and nailed the sheathing. When weather did not allow that work to be done, he and Lauzon worked together installing solid bridging with Campbell holding the bridging for Lauzon and also nailing it in place. Local 1256 claims that the work which Campbell had been performing together with Lauzon was the work of a carpenter. The respondent claims it to be the work of a carpenter's helper and, therefore, not the work of a

carpenter. The respondent claims, moreover, were the Board to agree with Local 1250, the Board should look at the work Campbell was doing for the majority of the time he was employed until the application date. On that basis, the respondent submits, the Board would find Campbell to be a labourer.

13. Obviously the work which Campbell was doing prior to September 28th does not assist Local 1256's position that he is a carpenter. Therefore, if that work does not establish him as a carpenter, it is unnecessary for the Board to decide whether it would consider the earlier period of his employment. Campbell did not own any of the tools of the carpenter trade and was loaned a carpenter's hammer and measuring tape by the general foreman when Campbell began to work with Lauzon. He had been hired as a labourer and received the same rate of pay throughout his employment with the respondent. The evidence does not reveal his actual rate of wages, but it is reasonable to infer from the evidence with respect to the manner in which he and Lauzon were employed and from the evidence with respect to Lauzon's wage rates that Campbell was earning from 65 to 75 percent of the wages paid to Lauzon and Delmotte as carpenters. He had to be shown by Lauzon the proper way to measure lumber and, while he did do some cutting of lumber to size using the power saw available, he was taken off that work because he lacked the skill to do it safely. On the other hand, except for the use of the power saw, he used the same tools which Lauzon used and did much the same work which Lauzon was doing when the two of them worked together. If Campbell was carrying lumber for Lauzon it follows that he did not spend as much of his time doing the same work of a carpenter as Lauzon did.

14. While the fact that Campbell worked with Lauzon doing much the same work as Lauzon and the other carpenters points toward a conclusion that he was working as a carpenter, the Board considers it significant that Campbell was instructed by the general foreman, Munt, not to use the power saw because he lacked the skill to do so safely. While the ability to use a power saw properly and safely may not be a skill exclusive to the carpenter trade, it is difficult to see how a person could function as a carpenter absent such a basic skill. That circumstance points persuasively to a conclusion that Campbell was working as a carpenter's helper and not as a carpenter when he was working with Lauzon. When it is considered together with the fact that Campbell did not possess skills similar to Lauzon and the other carpenters, was paid substantially less, carried lumber and placed and held lumber for Lauzon, work more characteristic of that of a carpenter's helper, the Board concludes that he was performing the work of a carpenter's helper and not the work of a carpenter. Therefore Campbell is not an employee in the bargaining unit described above.

15. The Board finds, therefore, that there were four employees in the bargaining unit on the date of making of this application. Having regard for the membership documents filed by the applicant as described above in paragraph 2, the Board finds that not less than forty-five per cent and not more than fifty-five percent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on November 1, 1983, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

16. The Board directs that a representation vote be taken of the employees of the respondent in the bargaining unit described in paragraph 8. All employees of the respondent in the bargaining unit as of the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

17. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.
 18. The matter is referred to the Registrar.
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2594-83-U William Frederick Burrows, Complainant, v. **Lloyd McHugh & Son Limited** and The International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of The United States and Canada and Local 345 of The International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of The United States and Canada, Respondents

Practice and Procedure — Remedies — Unfair Labour Practice — Review of Board practice where allegation of non-compliance with direction in unfair labour practice complaint

BEFORE: R. O. MacDowell, Acting Alternate Chairman, and Board Members W. H. Wightman and H. Kobryn.

DECISION OF THE BOARD; August 9, 1984

1. This is a complaint under section 89 of the *Labour Relations Act*. In a decision dated May 28, 1984, another panel of the Board determined that the respondent employer Lloyd McHugh & Son Limited contravened section 66(a) of the Act by laying-off the complainant before the normal end of the work season because he enlisted the assistance of his trade union. The Board directed the respondent employer to pay to the complainant back wages and interest thereon in the amounts set out in paragraph 11 of that decision.

2. By letter dated July 17, 1984, counsel for the complainant notified the Board as follows:

This concerns a Section 89 complaint which was originally filed with the Board on or about February 3rd, 1984. The Board heard the matter on May 22nd, 1984 and rendered a decision dated May 28th, 1984.

Paragraph eleven of the Board's decision states: "We direct Lloyd McHugh and Son Limited to pay to the complainant: (a) compensation for three weeks wages in the amount of \$300.00 per week; (b) an amount equal to five percent of this wage loss compensation in respect of pension plan contribution; (c) interest on the amount specified in paragraphs (a) and (b) calculated in the manner prescribed in practice number 13, dated September 18th, 1980."

We would like to advise the Board that although a month has elapsed since a copy of the Board's decision was received by this office, absolutely no payment has been received by either Mr. William Frederick Burrows nor by this office on his behalf from Lloyd McHugh & Son Limited. We further

advise that we have received no communication from the respondent Lloyd McHugh & Son Limited at any time.

Thank you for your consideration in this matter and look forward to the Board proceeding in this matter.

3. The Board provided a copy of the letter to the solicitors for the respondent employer, with the following covering letter from the Registrar of the Board:

I enclose herewith a letter from the solicitor for the complainant which alleges that the respondent, Lloyd McHugh & Son Limited, has failed to comply with the Board's order dated May 28th, 1984, directing the said respondent to pay the complainant compensation as indicated therein.

If you have any representations to make with respect to the said submission of the complainant, you must file them with the Board not later than August 8th, 1984.

If you fail to file any submission on or before that date, or if the Board is satisfied on the submission made to it that there has been non-compliance with the said Board order, the Board will file the said order in the Supreme Court pursuant to section 89 (6) of the Labour Relations Act.

4. Section 89(6) of the *Labour Relations Act* provides:

Where the trade union, council of trade unions, employer, employers' organization, person or employee, has failed to comply with any of the terms of the determination, any trade union, council of trade unions, employer, employers' organization, person or employee, affected by the determination may, after the expiration of fourteen days from the date of the release of the determination or the date provided in the determination for compliance, whichever is later, notify the Board in writing of such failure, and thereupon the Board shall file in the office of the Registrar of the Supreme Court a copy of the determination, exclusive of the reasons therefor, if any, in the prescribed form, whereupon the determination shall be entered in the same way as a judgment or order of that court and is enforceable as such.

5. Although section 89(6) could be read as requiring the Board to file its determination with the Registrar of the Supreme Court upon merely being notified of non-compliance, the Board has generally required a party requesting that the order be filed, to prove the fact of non-compliance if such is disputed. This practice received the approval of the Court in *Chairtex Manufacturing*, [1971] 3 O.R. 154. Typically, the Board would schedule a hearing to deal with this matter even when the fact of non-compliance was not formally disputed. However, the Board has recently introduced a procedure whereby it advises the respondent of the allegation of non-compliance, and permits the respondent to take issue with that submission. (See *Apple Bee Shirts Limited*, [1983] OLRB Rep. Dec. 1957.) Where the respondent either agrees that there has been a failure to comply with the Board's determination or simply does not respond to the allegation of non-compliance, the Board will file its determination with the Court pursuant to section 89(6) of the Act, because, in the absence of any response, it will normally

be satisfied that there has been a failure to comply. Neither *Chairtex* nor the terms of the statute *require* a hearing and none is necessary where the fact of non-compliance is not put in issue.

6. In this case the Board notified the solicitors for the respondent employer of the complainant's allegation of non-compliance by letter dated July 25, 1984. By letter dated August 1, 1984, the solicitors for the respondent employer responded as follows:

I acknowledge receipt of yours of July 25th in the above and I have noted its contents.

The Complainant's lawyer is correct, in that my client has not paid the compensation as directed by the Order of the Board, because it has no assets with which to so do. As we pointed out to you earlier, the Theatre has been taken over by the First Mortgage [sic] under power of sale proceedings, the Company has no income and no assets and is virtually in an insolvent position.

If the Company had assets and income and was solvent, it would honour the Board's decision, and, in fact, it would have defended the action.

7. On the basis of this response the Board is satisfied that the employer has failed to comply with the Board's order dated May 28, 1984. Counsel for the employer in his letter reproduced above candidly concedes the fact of non-compliance, albeit with an explanation. In the circumstances, the Board hereby files a copy of its determination of May 28, 1984, with the Registrar of the Supreme Court of Ontario, so that the complainant may seek enforcement.

2022-83-M The Bricklayers, Masons Independent Union of Canada Local 1, Applicant, v. The Masonry Contractors Association of Toronto Inc. and **Parlay Construction Ltd.**, Respondents

Arbitration — Construction Industry Grievance — Damages — Remedies — Collective agreement providing for “penalties” where timely remittances not made — Use of term “penalty” not conclusive — Whether penalty or estimate of damages

BEFORE: Ian C. Springate, Vice-Chairman, and Board Members F. W. Murray and C. A. Ballentine.

DECISION OF THE BOARD; August 13, 1984

1. This is a referral to the Board under section 124 of the *Labour Relations Act*.
2. On March 26, 1984 the Board issued a decision in this matter which read, in part, as follows:

“2. The parties acknowledge that Parlay Construction Ltd. is bound by the terms of two collective agreements entered into between the Masonry Contractors’ Association of Toronto Inc. and the Bricklayers, Masons Independent Union of Canada, Local 1. One of these collective agreements relates to bricklayers, the other to bricklayers’ assistants.

3. The collective agreements require that Parlay Construction Ltd. pay certain sums to an employee welfare plan. The agreements also require that the company deduct amounts equivalent to union dues from employee wages and forward them to the union. The parties acknowledge that the company failed to meet the stated time limits for making a number of these payments. On January 16, 1984 the company gave the union three cheques to cover the amounts then outstanding. One cheque, dated January 16, 1984 was with respect to amounts owing for the months of July and August, 1983. This cheque was honoured by the bank. A second cheque was post-dated to February 16, 1984. This cheque was for \$3,386.90, the amount owing by Parlay Construction Ltd. with respect to the months of September and October, 1983. This cheque was not honoured by the company’s bank. The third cheque was post-dated to March 16, 1984. This cheque, in the amount of \$1,455.80, was to cover amounts owing with respect to the months of November and December, 1983. As of the date of the hearing the applicant had not yet presented this cheque for payment.”

The Board then went on to direct payment of the amounts still owing, which totalled some \$4,842.70. However, the Board reserved on the issue of the enforcement of certain “penalty” provisions in the collective agreements.

3. Article 26 in both collective agreements provide as follows:

“26 PENALTIES

A) Any employer which fails to remit monies required in accordance with article 24 (Welfare) and article 25 (Check-Off) by the 15th of the month will be assessed a charge of 1% on the money owing. If any such employer has failed to make the same remittances by the end of the month in which they became due, an additional charge of 2% of the monies owing will be assessed.

B) If after exhausting the grievance procedure, and Arbitration Board has issued a finding of a violation of Articles 8, 9, 10, 14, 24, 25A of this agreement, the violating party shall be liable to pay a penalty of \$500.00 to the other party as well as a further penalty of 10% of any monies owing by that party to the other party.”

4. There is no question but that Parlay Construction Limited failed to make timely payments to the employee welfare plan contrary to article 24 of the collective agreements and, in addition, failed to remit to the union amounts deducted from employee wages for union dues contrary to article 25A. Accordingly, by the terms of article 26(A) an additional 3% of the amounts involved became payable. Further, in that this Board, acting as an arbitration board, found the company to be in violation of articles 24 and 25, under article 26(B) a further 10% became payable on the amount then still owing as well as an additional \$500.00. It is the position of the respondents, however, that these amounts represent penalties for breach of the collective agreements and hence at law are unenforceable.

5. The general approach of the civil courts is to enforce an amount stipulated for breach of a contract if the amount in question is a genuine pre-estimate of damages, but not to enforce it (at least not beyond the amount of any actual damages) if it is, in fact, a penalty. The courts have also made it clear that the use of the terms “penalty” or “liquidated damages” in a contract is not conclusive. In the leading case of *Clydebank Engineering v. Don Jose Ramos Yzquierdo Y Castaneda* [1905] A.C. 6 a clause specified that for each week that a ship’s delivery was delayed, a “penalty” of 500 pounds would have to be paid. The Earl of Hallsbury L.C. analyzed the clause in question as follows:

“The first objection is one which appears upon the face of the instrument itself, namely, that it is a penalty, and not, therefore, recoverable as a pactional arrangement of the amount of damages resulting from the breach of contract. It cannot, I think, be denied — indeed, I think it has been frankly admitted by the learned counsel — that not much reliance can be placed upon the mere use of certain words. Both in England and in Scotland it has been pointed out that the Court must proceed according to what is the real nature of the transaction, and that the mere use of the word “penalty” on the one side, or “damages” on the other, would not be conclusive as to the rights of the parties.”

6. In ascertaining whether amounts referred to in a collective agreement are a penalty or a pre-estimate of liquidated damages, a helpful guide is the reasoning of the United States 7th Circuit Court in *United Order of American Bricklayers and Stone Masons Union No. 21 v. Thorleif Larsen & Sons, Inc.* 89 LRRM 3113. In that case, a collective agreement contained a clause that made the employer liable for an additional 10% payment on failure to remit welfare and benefit fund contributions in a timely fashion, as well as for payment of all these monies. In construing this clause, the court carefully considered the question of penalties vis-a-vis

liquidated damages in the context of an agreement arrived at under a collective bargaining regime. Pell C. J. Set out the requirements of liquidated damages as being two-fold:

"(a) the amount so fixed is a reasonable forecast of just compensation for the harm that is caused by the breach, and

(b) the harm that is caused by the breach is one that is incapable or very difficult of accurate estimation."

It was the view of the court that the union's anticipated damages would go beyond mere loss of the use of funds, but would also include increased administrative costs from collection efforts, the cost of attempts to forecast receipts, possible loss of benefits to employees and harm to labour-management peace. In the circumstances, the Court concluded that it would be just and equitable to regard the collective agreement provision as a genuine pre-estimate of damages and to enforce it. The essential part of the Court's award is set out below:

"It is clear that the defendant contractually agreed to make the contributions and to pay an additional 10% if the payment was not made in time. This would appear to be 'a part of the consideration which [the appellee] agreed to pay for services performed by his employees.'

An underlying purpose of a labor agreement is to provide for a period of industrial harmony between labor and management. It is in keeping with the spirit of our federal labor relations policy that labor contracts are to be enforced as negotiated by the parties. While the difficulties of the advance accurate estimation of damages are otherwise adequately demonstrated in the present case, we do note the difficulty, if not impossibility, of quantifying the intangible damages to labor-management harmony resulting from failure to comply with the provisions which have been hammered out in bargaining sessions.

We are satisfied that the plaintiff has clearly established that the harm caused by the breach is one that is very difficult of accurate estimation. That having been established, we are unable to say under the particular circumstances of this negotiated labor contract that the amount so fixed is not within the range of reasonable forecast of just compensation for the harm caused by the breach."

7. In our view, the 1% and 2% figures in article 26(A) of the collective agreements we are dealing with are properly viewed as pre-estimates of the costs associated with late payment of the money in question, and not as penalties. In this regard we would also refer to the decision of the Board in *Beckett Elevator Company, Limited* [1983] OLRB Rep. Sept. 1391 where the Board stated that the requirement of interest is not a penalty but part of the compensation for loss incurred by a breach of a collective agreement. We are also of the view that the additional 10% which becomes payable if the union is required to get an arbitration award to enforce the agreements should be viewed in the same light, especially given the additional time it may take for the arbitration process to be completed. As for the \$500.00, we see that as an estimate (and a conservative one at that) of the union's cost in taking a matter to arbitration. We would note in this regard, that a board of arbitration, including this Board when acting under section

124 of the Act, lacks the general power of a court to award costs, and accordingly, any such authority must be found in the relevant collective agreement.

8. Having regard to the foregoing, we are satisfied that the payments required by article 26 are not penalties, but rather enforceable pre-estimates of losses arising from an employer's violation of the collective agreements. Accordingly, in addition to the amount referred to in the Board's decision of March 26, 1984, the Board hereby directs Parlay Construction Ltd. to forward to the applicant \$239.30, being interest of 3% on the total amount not paid on time, \$484.27, being interest of 10% on the amount covered by the Board's order of March 26, 1984 plus an additional \$500.00. This makes a total of \$1,223.57 payable to the applicant over and above the amounts referred to in the Board's order of March 26, 1984.

0413-84-M National Association of Broadcast Employees & Technicians, Applicant, v. Pathe Video Inc., Respondent

Employee — Employee Reference — Practice and Procedure — Dispute as to whether new appointments managerial arising during lawful strike — Whether reference timely as being “in the course of bargaining” — Duties performed during strike not useful for determination — Fact that duties of new positions not exercised at time of hearing not preventing Board determining reference

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members J. A. Ronson and P. J. O'Keefe.

APPEARANCES: *Lewis Gottheil and Kenneth Steel for the applicant; M. E. Geiger, Perry Jameson and M. J. Mikelberg for the respondent.*

DECISION OF THE BOARD; August 7, 1984

1. This matter involves an application under section 106(2) of the *Labour Relations Act*, requesting the Board to determine whether certain individuals occupying the classification of “supervisor” exercise “managerial functions” within the meaning of section 1(3)(b) of the Act. The application was first filed on February 17, 1984, with respect, it would appear, to:

Ken Sadovnick	Quality Control Supervisor
	and
Michelle Conroy	Quality Control Supervisor

and amended by the applicant union on June 1, 1984, to add:

Garry Swaffield	Lab Supervisor
	and
David Scott	Lab Supervisor

as a result of a job-posting for additional supervisors at the end of May.

2. Of primary significance in this application is the fact that the parties on November 30, 1983, after discussing with a Labour Relations Officer the duties and responsibilities of the three supervisors employed by the respondent at that time, namely:

Hughes	Quality Control Supervisor
Hemmings	Shipping and Receiving Supervisor
	and
Hartman	Lab Supervisor

agreed that all three exercised managerial functions, and specifically excluded their job classifications from the bargaining unit.

3. The applicant union does not now seek to resile from that agreement, and indeed, the Board would not permit it to (cf. *Westmount Hospital*, [1980] OLRB Rep. Oct. 1572). Rather, the respondent employer indicates that it has found it necessary to make certain changes in its operations, and an increase in the number of supervisors, and the applicant claims that the result has been that the persons occupying the position of Lab Supervisor and Quality Control supervisor no longer exercise the same duties and responsibilities as the persons formerly excluded. The officer appointment, therefore, will be limited to changes in the duties and responsibilities of the Lab and Quality Control supervisors since the agreement of November 30, 1983 was entered into.

4. The parties have, however, been locked in a lawful strike since June 18th, the day Messrs. Swaffield and Scott were actually promoted, and the respondent has taken the position that the application could not and should not proceed until the strike has been settled. The respondent argues that no bargaining is taking place, and the applicant's request to proceed is untimely. The respondent further points out that all of its supervisors and other managerial persons are, as one might expect, being used to operate the production facility while the employees are engaging in their strike, and that nothing would be gained by having an officer inquire into the kind of work that supervisors are being presently required to perform.

5. Section 106(2) provides:

If, in the course of bargaining for a collective agreement or during the period of operation of a collective agreement, a question arises as to whether a person is an employee or as to whether a person is a guard, the question may be referred to the Board and the decision of the Board thereon is final and conclusive for all purposes.

The Board finds that, with a lawful strike ongoing, the parties are clearly "in the course of bargaining", as those words are used in section 106(2), and that an application filed even now would be timely. Both parties have agreed to waive the "application" date as the cutoff point for evidence. On the other hand, the Board finds that evidence as to what the individuals in dispute are doing while the bargaining unit is out on strike is of no relevance to the officer's inquiry whatsoever. The inquiry before the Board is concerned with the place which these individuals occupy in the respondent's organization, and the responsibilities which their job calls upon them to exercise in connection with the employees under their supervision. A strike, therefore, curtails the availability of useful evidence to the Board's inquiry to the same extent that a plant shutdown does. This raises certain practical difficulties in connection with the most recent appointments, because there was virtually no time on the job which can be looked at

in connection with those two particular individuals. That does not, however, prevent a determination from being made by the Board: it simply has to do so on the basis of the evidence available. Compare *Corporation of the City of Barrie*, [1983] OLRB Rep. Aug. 1239. Apart from the duties and responsibilities of the job as may have been put forward during the posting process, for example, the Board presumably will hear evidence of the duties performed by other supervisors at the comparable level (particularly since some of those are in dispute) as well as the general evidence of the respondent with respect to the changes which have taken place. It would also be appropriate for the officer to endeavour to arrange his hearing and the taking of evidence in a manner which does not unfairly burden either side to the current economic dispute.

6. The matter is referred back to an officer.
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0002-84-M Reginald Robert, Complainant, v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of The United States and Canada (Local 800), Respondent

Financial Statement — Section 85(1) requirement to furnish copy of audited financial statement not restricted to audit by licenced chartered accountant — Audit by union's financial secretary/treasurer not adequate — Approval of financial statement by membership or accountant's comments not sufficient audit — Meaning of audit considered

BEFORE: S. A. Tacon, Vice-Chairman, and Board Members I. M. Stamp and M. A. Ross.

APPEARANCES: *John A. Desotti and Reginald Robert for the complainant; A. T. Ahee, M. Zangari and R. Schofield for the respondent.*

DECISION OF THE BOARD; August 23, 1984

1. This is a complaint under the *Labour Relations Act* relating to the furnishing of a financial statement.

2. Section 85 of the Act is as follows:

85.-(1) Every trade union shall upon the request of any member furnish him, without charge, with a copy of the audited financial statement of its affairs to the end of its last fiscal year certified by its treasurer or other officer responsible for the handling and administration of its funds to be a true copy, and, upon the complaint of any member that the trade union has failed to furnish such a statement to him, the Board may direct the trade union to file with the Registrar of the Board, within such time as the Board may determine, a copy of the audited financial statement of its affairs to the end of its last fiscal year verified by the affidavit of its treasurer or other officer responsible for the handling and administration of its funds and to furnish a copy of such statement to such members of the trade union as the Board

in its discretion may direct, and the trade union shall comply with such direction according to its terms.

(2) Where a member of a trade union complains that an audited financial statement is inadequate, the Board may inquire into the complaint and the Board may order the trade union to prepare another audited financial statement in a form and containing such particulars as the Board considers appropriate and the Board may further order that the audited financial statement, as rectified, be certified by the person licensed under the *Public Accountancy Act* or a firm whose partners are licensed under that Act.

3. There was no dispute that the complainant, Mr. Reginald Robert, was a member of Local 800 and entitled to request a financial statement under section 85 of the Act.

4. Mr. Robert testified that he first requested a financial statement at the monthly membership meeting in October 1982 and that Mr. Schofield, the Assistant Business Manager, who was chairing the meeting replied that the office was in shambles and the union was in the process of computerizing the financial records but, when this was completed, financial statements would be distributed to those members who requested a copy. Mr. Robert stated that he took the statement at face value and dropped the matter for a while. In the spring of 1983, when Mr. Robert was speaking with Mr. Schofield by telephone on another matter, he said he asked how the financial statement was coming along and was told that the statement was not yet complete. In the summer of 1983, Mr. Robert stated that, during a further telephone call with Mr. Schofield on another matter, he again inquired about the financial statement and was informed that the statement was still not finished. In December 1983, Mr. Robert testified that he went to the local office with a Mr. Dan Pepper and personally spoke with Mr. Schofield yet again seeking a copy of the financial statement. According to Mr. Robert, Mr. Schofield replied that the statement was ready but locked up and only Mr. Zangari, who was out of town at that time, had a key.

5. Mr. Robert said he then decided he should send a written request and did so on February 14, 1984. On receipt of Mr. Zangari's letter of February 16, 1984, stating that the 1983 financial statement would not be available until June, Mr. Robert wrote another letter to the Executive Board of the Local dated February 21, 1984.

6. Mr. Robert then testified that he instructed a lawyer, Mr. Poupore, to write to Mr. Ahee, counsel for the respondent, requesting a copy of the financial statement for 1982. Counsel for the respondent objected to the introduction, through Mr. Robert, of copies of two letters allegedly from Mr. Poupore. The Board received the letters but reserved its decision on admissibility. After due consideration, the Board hereby rules the copies of the letters are inadmissible for the purpose of proving whether the letters were, in fact, sent or received. However, the Board also notes that nothing turns on this point.

7. At the March general membership meeting, Mr. Robert stated that he received a financial statement for the year 1982, with a cover letter titled "Accountants' Comments" signed by a firm of Chartered Accountants, Resnick, Layton, Witkin & Wise. That cover letter states, in part, "...However, in accordance with the terms of our engagement, we have not performed an audit and consequently do not express an opinion on these financial statements. . .".

8. By letter dated March 28, 1984, Mr. Robert next lodged a complaint with the U. A. General Executive Board in Washington, D.C. against Local 800, and specifically Mr. Zangari, with respect to the failure to provide an audited financial statement for 1982. In a subsequent letter of May 24, 1984, to Mr. St. Eloi, Director of Canadian Affairs, U.A., Mr. Robert clarified that he had not, as yet, filed a formal complaint with the Ontario Labour Relations Board but merely a notice of intention to file if the Local did not provide the requested financial statement. Since, in Mr. Robert's view, what he received at the March general membership meeting was an unaudited financial statement, he proceeded with his complaint before this Board.

9. Counsel for the complainant sought to introduce evidence which, in his view, indicated that the Local was attempting to intimidate and and coerce Mr. Robert for filing a complaint under section 85 of the Act. The union objected on the grounds that the matter before the Board solely concerned section 85. The Board ruled that alleged violations of other sections of the Act were not properly before this Board at this time. However, the Board noted that the complainant was entitled to file additional complaints dealing with alleged violations other than section 85, if he so wished. The Board also notes that section 80 of the Act makes it unlawful for an individual to be discriminated against or intimidated because, inter alia, he has instituted proceedings before the Board.

10. In cross-examination, Mr. Robert stated that he had attended about six monthly membership meetings over the past two years and acknowledged that at each such meeting the monthly financial statement was read to the members. The complainant admitted that the members then voted to accept or reject the financial statements as read.

11. The next witness, Mr. Fred Shaw, testified he was a member of Resnick, Layton, Witkin & Wise, a firm of Chartered Accountants specializing in work for union, union-related and other non-profit organizations. Mr. Shaw's evidence may be summarized as follows. The firm was engaged to prepare the local's financial statement for 1982 and did so, in accordance with the procedures and format used in previous years. The firm performed an accounting function for the Local and did not audit the financial statement. That is, the firm, examined and reviewed the financial records in Sudbury and prepared the financial statement. As necessary, the firm discussed the records with Mr. Zangari and the union's bookkeeper. Mr. Shaw testified that an audit of the financial statement, however, would have involved roughly twice as much time and would have included independent testing of the financial records.

12. Mr. Michael Zangari testified that he has held the position of Business Manager from 1979 to the present, has been a member of the Local since 1967 and also holds the office of Financial Secretary-Treasurer. In this latter position, he stated that he is responsible for the finances of the Local. That is, his duties include reviewing all monies received and expenditures, investing funds, preparing monthly and annual financial statements and such like. The Local employs a full-time bookkeeper who works under the supervision of Mr. Zangari. Cheques are signed by both Mr. Zangari and the President of the Local. Mr. Zangari stated that he reads the complete, itemized monthly financial statement at each monthly membership meeting, opens the matter for discussion or questions and then the membership votes to accept or reject the statements. He testified that a similar procedure is followed with respect to the annual financial statements.

13. Mr. Zangari agreed that he gave the complainant an unsigned copy of the financial statement for 1982 at the March 1984 monthly membership meeting. He explained the

statement was not signed because it had not been approved by the membership at that time. The financial statement was subsequently accepted by the membership at the June 1984 monthly membership meeting.

14. At the hearing, counsel for the respondent entered, as Exhibit 13, the financial statements of the union for 1981 and 1982 with a covering affidavit, which Mr. Zangari acknowledged as his. Item 5 of the affidavit states: "That this financial statement referred to above, was audited by myself, in my capacity of financial secretary-treasurer, and by the general membership of the respondent union on a continuing monthly basis."

15. During cross-examination, Mr. Zangari admitted that he had no professional qualifications with respect to auditing accounts nor is he paid separately by the union to audit its books. In Mr. Zangari's view, he audits the books and the membership audits him at the monthly membership meeting. Mr. Zangari acknowledged, however, that the members "will have to take our word for it" when questioned as to how members would know whether the accounts, as read out at the monthly membership meeting, were accurate. Mr. Zangari also acknowledged that he had seen audited financial statements, namely, the trust fund documents, which are required to be audited by a firm of chartered accountants.

16. In further cross-examination, Mr. Zangari stated that the union constitution provided for a Finance Committee, elected by the members at the same time as other union officers, which could check the financial records if it so wished. Mr. Zangari concluded that the Finance Committee had never held a meeting, to his knowledge, and stated that the current Committee members were Mr. Defend, Mr. Giommi and Mr. Johnston. Mr. Zangari indicated that he believed these members were nominated from the floor at the last meeting held to elect union officers.

17. In response to questions from the Board, Mr. Zangari replied that sections 118 and 119 of the constitution, filed at the hearing as an exhibit, dealt with the Finance Committee but, beyond this, there was nothing in the constitution regarding record keeping or auditing of financial statements.

18. During reply, Mr. Zangari testified that Mr. Defend examined the books for one to one-and-one-half hours approximately a year ago but had not asked Mr. Zangari any questions.

19. Counsel for the complainant called one witness in reply. Mr. Ronald Johnston testified, firstly, that he had never been denied access to the books. Secondly, he stated that he had spoken with the other two Committee members on a job and they were going to get together but the meeting never materialized and, in fact, the Committee had not met during the past two years. In cross-examination, Mr. Johnston replied that he was partially aware of the union's constitution, that he had never been on the Finance Committee before and had no expertise in the area but figured that he'd "pick it up" as he went along.

20. In the Board's view, there is no real dispute over the facts. The Board notes that the testimony of Mr. Robert, in particular, was given in a forthright and straightforward manner. The Board is satisfied that the complainant requested a copy of the audited financial statement for 1982 in a timely fashion and an appropriate manner. Mr. Robert continued to take reasonable steps to obtain an audited financial statement for 1982.

21. The question then before the Board is whether the financial statement for 1982, marked as Exhibit 6 and given to Mr. Robert at the March 1984 monthly membership meeting or as submitted as Exhibit 13 at the hearing is an “audited financial statement” within the meaning of section 85(1).

22. Counsel for the complainant argued that the phrase “audited financial statement” must mean “a financial statement audited by a firm of Chartered Accounts” and that “Accountants’ Comments” did not meet the required standard. Essentially, counsel submitted that with lesser meaning for the term “audited”, section 85(1) would have no teeth, that there would be no means for a union member to know whether the financial statement presented was accurate or fraudulent. Counsel relied primarily on *Canadian Union of General Employees*, [1974] OLRB Rep. Dec. 878 (the *Ledwith* case) and distinguished *Murray G. Strong*, [1981] OLRB Rep. July 901 on the basis that, at least, in the *Strong* case, the accountant, who was a Chartered Accountant, had testified before the Board with respect to the preparation of the financial statement. Counsel for the complainant submitted that *Strong* did not stand for the proposition that someone who has the day-to-day control of the books and was the chief contact of the accountant could “audit” the financial statement. Further, it was the submission of counsel for the complainant that “Accountants’ Comments” were not the equivalent of an audited statement and that this Board should not accept those “Comments” as the equivalent, given the evidence as to the differences between “Accountants’ Comments” and an “audit” particularly with respect to the independent testing which is an integral part of the latter process. Finally, counsel for the complainant submitted that the issue before the Board only dealt with section 85(1) and not 85(2) at this time.

23. Counsel for the respondent union asserted that the union had, in fact, complied with section 85(1). That is, Exhibit 13 constituted a copy of an audited financial statement certified by the union’s treasurer or other officer responsible for the handling and administration of its funds to be a true copy as required by section 85(1). Further, it was submitted that Exhibit 13 contained audited financial statements for both 1981 and 1982. Counsel for the respondent argued that the term “audit” should be given its ordinary meaning, namely, “to observe, account, check, hear” and not a specialized meaning, i.e., an audit performed by a Chartered Accountant firm. Counsel relied primarily on the *Strong* case, particularly paragraph 13 where the Board accepted a financial statement to be “audited” within the meaning of section 85(1) despite the fact that the statement was not audited by a firm of chartered accountants. The *Ledwith* case was distinguished on the basis that the union constitution in question had specifically stipulated that the financial statement was to be audited by a registered firm of chartered accountants and, here, there was no similar requirement in the constitution. Counsel submitted that Mr. Zangari had, in fact, audited the financial statement and, further, the membership had voted to accept the monthly financial statements and the annual financial statements. Finally, counsel argued that the Board should not construe section 85(1) to mean a financial statement audited by chartered accountants where section 85(1) does not expressly refer to the *Public Accountancy Act*, as does section 85(2) and in view of the financial burden which could be thereby imposed on unions.

24. The Board has reviewed a number of decisions dealing with section 85 (and its predecessor sections) including: *International Union of Operating Engineers, Local 796*, [1967] OLRB Rep. 910; *J. R. Canvin*, [1968] OLRB Rep. 1113; *Local 736, International Ironworkers Association of Bridge & Structural & Ornamental*, [1968] OLRB Rep. Apr. 78; *Victor Ledwith, supra*; *Amalgamated Transit Union, Local 113*, [1979] OLRB Rep. Oct. 917; *Murray G. Strong, supra*; *Edward Miller*, [1983] OLRB Rep. Nov. 1864. In the Board’s view, only

the *Ledwith* and the *Strong* decisions are at all relevant to the precise issue before this Board, i.e., the meaning of “audited financial statement” in section 85(1).

25. In the *Ledwith* case, the union’s constitution expressly imposed an obligation on the General Secretary-Treasurer to have the books audited each year by a registered firm of chartered accountants selected by the General Executive Board. That Board found that there was no way of knowing whether what was given to the complainant represented the financial statements audited in accordance with that provision. The General Treasurer had certified that the statement given the complainant was the audited financial statement whereas the Act required the officer to certify that what was given to the union member was a true copy of an audited financial statement. The Board found that the complainant had not been given an audited statement. However, because the union constitution expressly required annual financial statements to be audited by a registered firm of chartered accountants, the *Ledwith* case cannot be read, as counsel for the complainant submits, as standing for the proposition that “audited financial statement” as used in section 85(1) means “audited by a registered firm of chartered accountants”.

26. In the *Strong* case, it was “the uncontradicted evidence before the Board that the trustees of the respondent union have audited this financial statement” (at 904). The Board found that, despite the fact that the financial statement had not been audited by the respondent trade union’s chartered accountants, the respondents had satisfied the requirement of section 76(1) [now section 85(1)] — of the Act. It is not clear in the decision just who comprised the trustees, what their functions were, or how they were selected. The decision, then, may be said to recognize that a union may comply with section 85(1) without having a financial statement audited by a firm of chartered accountants but does not answer the precise question before this Board, namely, has the respondent in *this* case satisfied the requirements of section 85(1).

27. In this Board’s view, section 85(1) does not impose an absolute obligation that financial statements must be audited by a registered firm of chartered accountants. The term “audited” is not defined in the Act. Further, the specific reference to “a person licensed under the *Public Accountancy Act* or a firm whose parties are licensed under that Act “in section 85(2) strengthens the Board’s view that, where the term “audited” appears in section 85(1), it should not be given a specialized meaning.

28. The dictionary definition of “audit” is as follows“

1a: a formal or official examination and verification of books of accounts (as for reporting on the financial condition of a business at a given date or on the results of its operations for a given period) b: a methodical examination and review of a situation or condition (as within a business enterprise) concluding with a detailed report of findings: a rendering and settling of accounts 2: the final report following a formal examination of books of account: an account as adjusted by auditors: final statement of account 3: archaic: a judicial examination (as in a court) 4: AUDIT ALE 5: a check of publishers’ records to verify claims as to the extent of a publication’s circulation.

(Webster’s Third New International Dictionary).

29. In the Board's view, an essential component of the "final or official examination and verification of books of accounts" is some "distance" between the person or group which conducts the examination and the person or group which recorded the accounts initially. This "distance" or "independence" need not be a formal, arms length relationship as found in an audit by a registered firm of chartered accountants. However, where a union asserts that the financial statements are, indeed, "audited" by someone other than a registered firm of chartered accountants (where the standards of "auditing" are set by the professional body), the Board must examine the particular circumstances involved, including factors such as who performed the "audit", under what conditions, the relationship of the "auditor" to the person having effective control of the financial records on a day-to-day basis, etc. A second essential component of an "audit" is the competence of the person or group conducting the examination. Again, the Board is not insisting on the level of expertise required for licencing under the *Public Accountancy Act*. However, it is necessary for the union to establish that the "auditors" were sufficiently familiar with accounting practices and record-keeping to ensure that a searching review of the books was, in fact, conducted.

30. In this case, Mr. Zangari stated that he audited the financial records and the membership audited him. The Board does not consider that Mr. Zangari's review of records he compiled initially to be an "audit"; in the Board's view, a person cannot "audit" himself or herself and still comply with section 85(1). Further, the Board does not consider that a vote to accept financial statements as read out at a membership meeting as a sufficient "formal or official examination" to constitute an "audit". The members simply cannot effectively verify the contents of the statements in the context of a membership meeting where financial statements are merely read aloud. Mr. Zangari himself acknowledged, on cross-examination, that the members, essentially, would "have to take our word for it" with respect to the accuracy of the financial statements. Neither Mr. Zangari's review of the books nor the membership's vote to accept the financial statements met the test of distance and competence as set out above by the Board. The Board, as well, does not accept the "Accountants Comments" as the equivalent of an audit within the meaning of section 85(1) since that procedure does not involve an independant testing of the financial records.

31. The evidence also showed that the union's constitution did not specifically address record-keeping or auditing of financial records. Sections 118 and 119 do provide for a Finance Committee. The responsibilities of this Committee include examining the bank books and bank accounts and counting the money in the possession of the Financial Secretary and Treasurer. Further, the Committee shall, if necessary, require a bank statement from the cashier of the bank in which the Local monies are deposited and report their findings at the first regular meeting in the following month. The Finance Committee shall have the power to examine the accounts of the different officers any time they deem it necessary and officers interfering with the Committee's functions in this regard shall be fined.

32. There was no dispute that the Finance Committee has not met for at least the past two years. The Board notes that the Committee, therefore, has not fulfilled its obligations under the constitution. Although not directly relevant, the Board is rather puzzled by Mr. Zangari's testimony that, in his view, it is entirely up to the Finance Committee to arrange their own meetings, in light of the central responsibility of the Business Manager as "trustee of the welfare of the members of the Local Union" (Section 104) and Mr. Zangari's own testimony that elected officers find it difficult to attend membership meetings because of the geographically disperse locations of job sites. If mere attendance at scheduled meetings is difficult, it would be even

more difficult for members of the Finance Committee to arrange meetings without the assistance of the Business Manager. Had the Finance Committee actively carried out its functions, the Board might have reached a different conclusion in this matter.

33. However, based on the evidence, the Board finds that what the union submitted, at the hearing was not unaudited financial statement certified as required by section 85(1). What Mr. Robert received at the March 1984 monthly membership meeting certainly did not fulfill the requirements of section 85(1). Therefore, the Board hereby directs the respondent to file with the Registrar, not later than October 20, 1984, a copy of its audited financial statement for the year 1982 verified by affidavit of its treasurer or other officer responsible for the handling and administration of its funds and to furnish a copy of such statement to the complainant, together with a copy of the affidavit. Given all of the circumstances, the Board directs that the financial statement for 1982 be audited by a person licensed under the *Public Accountancy Act* or a firm whose partners are licensed under that Act.

34. At the hearing, the respondent submitted financial statements for 1981 and 1982. As noted in paragraph 6, the complainant was initially seeking an audited financial statement for 1982. The complainant later requested the audited financial statement for 1981 as well, in part asserting that, as the initial request was in October 1982, section 85(1) would entitle the complainant to the audited financial statement to the end of its last fiscal year, i.e. 1981. However, the Board is less concerned with this later technical agreement than with the substance of the complainant's requests, first orally and then in writing, for the 1982 statement. Further, the Board would stress that, for the union to comply with the Board's direction in respect of the 1982 fiscal year, will necessarily involve setting out the comparative figures for 1981. Thus, the complainant will receive data for the 1981 fiscal year; what the complainant will not receive is the comparative data for 1980.

35. The complaint is, therefore, resolved as directed above.

0667-83-U Timothy W. Smith and William Morton, Complainants, v. Toronto Joint Board Amalgamated Clothing & Textile Workers Union Local 1414J, Respondent, v. Group of Employees, Objectors

Duty of Fair Representation — Natural Justice — Practice and Procedure — Reconsideration — Remedies — Unfair Labour Practice — Union failing to appear found to be in breach of section 68 — Grievors' seniority reinstated as remedy — Whether other employees whose seniority affected by Board remedy entitled to notice of hearing — Board distinguishing *Hoogendoorn* and *Bradley* court decisions — Whether union's failure to properly defend first unfair representation charge contravening section 68 duty with respect to employees affected by Board remedy

BEFORE: R. O. MacDowell, Acting Alternate Chairman.

APPEARANCES: *Timothy W. Smith and William Morton on their own behalf; Paul Cavalluzzo and Jack Matraia for the respondent; Ross Drake for Xerox of Canada Ltd.; James Fyshe for the objectors.*

DECISION OF THE BOARD; August 9, 1984

1. This is a request for reconsideration of a decision of the Board dated December 19, 1983, which was heard together with a new but related complaint under section 89 of the *Labour Relations Act*. In order to appreciate the issues in these two proceedings, and their relationship to each other, it is necessary to review what the Board has already decided.

2. The complainants, Timothy W. Smith and William Morton, are employees of Xerox Canada Inc. They are represented for collective bargaining purposes by the Amalgamated Clothing & Textile Workers Union Local 1414. On July 28, 1983, they filed a complaint against their Local Union alleging a contravention of section 68 of the Act. That section reads as follows:

A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent trade union of the council of trade unions, as the case may be.

3. The complaint raised a number of concerns. One of them was that as a result of advice given to the complainants by a union official, or relayed to them from their Local union president through that union official, they lost their position on the company's seniority list. They were told that a transfer to another part of the company's operations would have no effect on their seniority. Acting on that advice, they accepted a transfer to another plant. But the advice was wrong. The two plants have separate seniority lists. Employees cannot "splice together" their years of service at the two locations — a fact which they learned to their chagrin when they were subsequently laid off and had to look for job openings back in the location where they had worked before. And, upon their return, they could not claim credit for the time worked at the second location.

4. In the complainants' view, they had suffered a double penalty: a loss of their jobs at the second plant, and an inferior position at their original location. The complainants' position was that, but for the union's erroneous advice, they never would have accepted a transfer. They never would have lost their position on the seniority list. Their "plant seniority" and their years of service would be the same. The complainants sought an order from the Board to put them in the same position as they would have been in had there been no bad advice and no consequent transfer to the company's second location.

5. A hearing in this matter was scheduled for July 26, 1983. The union got notice of the hearing. It did not appear. The Board proceeded in the union's absence, and heard the complainants' evidence.

6. After the hearing, but before the Board had issued a decision, the union sought to have the proceeding reopened for the purpose of soliciting further evidence — in effect, a request for a hearing *de novo*. On October 20, 1983, the Board scheduled a further hearing to allow the union to explain why it had not attended the first one, and to make submissions on its request for a new hearing. This request was opposed by the complainants.

7. The Board was not persuaded that it should reopen the case and conduct a hearing *de novo*. The reasons for that conclusion are set out in the Board decision, and need not be repeated in detail here. It suffices to say that, in the Board's view, the union did not establish sufficient grounds for granting a rehearing. It was admitted, for example, that the two union officials involved with the complaint, had not even bothered to read it carefully, or the notice of hearing. They had also assumed, quite unreasonably, that the case would be settled short of a formal hearing.

8. The complainants established a *prima facie* case. It was uncontradicted. They won. They requested a restoration of their seniority in order to put them in the position they would have been in had the union not tendered the bad advice on which they had acted to their detriment. The Board agreed:

37. The complainants' loss is tangible but, at this stage, not financial. This is not a case in which the Board should embrace the principles in *Radio Shack*, [1979] OLRB Rep. Dec. 1220, and try to calculate some monetary compensation based upon the work opportunities which the complainants may lose as a result of their loss of seniority. In my view, the most appropriate remedy is simply to direct that the union and Xerox rectify the complainants' position on the seniority list to put them in the position they would have been in had they never transferred to the distribution centre; that is, had they never received the bad advice upon which they acted to their detriment. The Board directs that the complainants be credited at the manufacturing centre with their *full company seniority*, just as if they had never left.

In response to a later request for reconsideration and clarification of this decision the Board commented:

3. The purpose of the Board's remedial order was, insofar as possible, to put the aggrieved employees in the position that they would have been in had their trade union not contravened section 68 of the Act. The breach of the Act consisted of a misrepresentation to the complainants upon which

they acted to their detriment. They left the manufacturing centre and transferred to the distribution centre — a transfer which the Board found, on the evidence before it, would not have occurred had they not been badly advised. Having left the manufacturing centre, of course, they were no longer accumulating “plant seniority” at the manufacturing centre. Their plant seniority is less than it would have been had they not transferred, by the amount of time that they spent at the distribution centre. In the Board’s view, it seemed most appropriate to simply direct the union and Xerox to rectify the complainants’ position on the seniority list to put them in the position they would have been in had they never been transferred to the distribution centre at all. To do that, it is only necessary to add to their existing *plant seniority* the time which they spent at the distribution centre since, had they not transferred there, their plant seniority would have been greater by this amount. If the complainants had only worked at the manufacturing centre, their plant seniority and company seniority would be the same and, this was the result that the Board sought to achieve. While this may well result in some change in their relative position on the seniority list, it is necessary to put the employees in the position that they would have been in had there been no breach of the Act by their union and it is preferable to trying to determine some monetary sum to compensate them for the loss of plant seniority or to remaining seized for months or perhaps years to see whether the potential detriment actually crystallizes.

4. Having regard to the foregoing, the Board directs that the complainants’ plant seniority be rectified so that it will include their total years of service at the manufacturing centre *and* the distribution centre.

It is this aspect of the Board’s decision which sparked the latest request for reconsideration and a new complaint against the respondent trade union. (Board File 3063-83-U)

9. The Board’s remedial order had the effect of putting the complainants in a higher position on the seniority list than they had before the complaint. It put them where they should have been but for the union’s error. It did not remove or diminish anyone else’s seniority, but by changing the complainants’ position, it did mean that *relative to others* they would have a better claim than they had before, to any rights or benefits under the agreement contingent upon seniority. More job security is the most obvious benefit (although there is no evidence that any layoff is contemplated which would “cut deep enough” to give the complainants any real advantage), however, in addition, there are also lesser benefits, such as an enhanced access to favourable shifts, temporary promotions, and so on. The precise impact of the rectification of the complainants’ seniority cannot be determined, but there is no doubt that they have gained something from their complaint and may continue to do so in the future. For example, one of the complainants has already received a temporary work assignment which he would not have received before.

10. The current request for reconsideration is made by the group of employees who are now one notch lower on the seniority scale because of the complainants’ change in position. When the complainants transferred out of the plant these individuals notionally moved up one notch and when the Board restored the complainant’s lost seniority they notionally moved down again. These employees have not actually lost any seniority, of course, but their relative position is marginally inferior to what it was before, and, as in the case of the temporary work assignment

mentioned above, at least one of their number will lose something which he would have had, but for the rectification of the complainants' seniority position. These employees claim that they have been adversely affected by the Board's decision and argue that before the Board made any decision affecting the complainants' position on the seniority list, it should have stopped the hearing and given all of the employees notice so that they could make submissions on remedy. They rely upon the decisions of the Supreme Court of Canada in *Re Hoogendoorn and Greening Metal Products and Screening Equipment Co.* (1967), 65 D.L.R. (2d) 641; and the Ontario Court of Appeal in *Re Bradley and Ottawa Professional Fire Fighters Association* [1967] 2 O.R. 311, 63 D.L.R. (2d) 376. They request a rehearing or, in the alternative, a reconsideration of the remedy question.

11. The related complaint addresses the same employees' concerns from another angle. That complaint alleges that the way that the union handled the first section 68 complaint was itself "arbitrary" and a breach of its section 68 duty of fair representation. It is asserted that the union negligently and unnecessarily forfeited the opportunity to present a "winning defence". The case was needlessly lost and, as a result, a number of employees represented by the union found themselves, in relative terms, in a poorer position on the seniority list. The second complaint seeks to rectify the consequences flowing from this lost opportunity. Of course, if the Board were to grant a new hearing in the first case or substitute some remedy which does not affect the other employees in the bargaining unit, the second complaint would be academic.

12. The particular circumstances of this case may be a little unusual, but the question it raises is a more general one: who has a right to be notified and to participate in an unfair labour practice proceeding, in addition to those whose statutory rights are clearly and directly in issue. The *Labour Relations Act* does not provide a clear answer. The rules and forms contemplate general notice to employees when representation questions are raised (certification applications, termination applications, successor rights applications, etc.), but they do not contemplate any general notice in unfair labour practice complaints. The Act does not give any precise guidelines for identifying potentially interested parties who should be given notice because of the kind or extent of their potential interest in the proceeding, or its possible result. Neither does the *Statutory Powers Procedures Act*. Nor does either statute address the question of whether notice to one party — here, the union, the immediate respondent and the employees' statutory bargaining agent — avoids the necessity of specific notice to persons allied in interest to the party (again, the union in this case) whose statutory rights are directly in issue.

13. This problem is not unique to the present circumstances. It could arise in many unfair labour practice situations — indeed, perhaps in most. It will be remembered that the employees' character and conduct are not in issue. They did not lose any seniority in any absolute sense. They are affected only *relatively* because the complainants, their fellow employees, regained seniority which they would have had had there been no breach of the Act. That scenario could arise in a number of cases.

14. Suppose, for example, that some employees had been discharged or laid off because of their trade union activity. If their unfair labour practice complaint were successful, they would in all likelihood be reinstated without loss of seniority or other employment benefits. But their return to the bargaining unit and the seniority list would inevitably affect the relative position of all employees below them on the seniority list. Should those affected employees be given notice so that they could appear with their employer to defend against the complaint, or perhaps to argue that the Board should not exercise its discretion under section 89(4) of

the Act to direct the aggrieved employees' reinstatement? And what of the replacement of illegally discharged employees by "new hires" who in all likelihood will be terminated if the aggrieved employees are reinstated? Are they to be entitled to notice of the unfair labour practice proceeding and a separate right to participate? Given that the Board is dealing with *collective* bargaining situations, it is difficult to conceive of many cases where employees could not assert some right to participate, based upon the potential affect upon them that a Board remedial direction might have. Thus, in the instant case, even if an award of damages were made against the Local union, this could be said to prejudicially effect the employee members of the Local who would ultimately have to make good on the compensation claim from their own pockets. Would those employees have a separate right to representation?

15. This problem is not a new one, of course, either before this Board or the Courts. In our complex economic society, it is not at all unusual that the results of particular litigation will have serious economic ramifications beyond the immediate parties to the dispute. Competitors, suppliers, and employees may all be vitally interested in the outcome. In the case of employees, for example, a decision which significantly impinges upon the way in which their employer does business, may result in the loss of their jobs. But this does not give them status to intervene in a contract action or one involving a patent or trade mark. The Courts in this context would hold that they are merely "commercially or incidentally rather than directly or legally affected". (See *Westgate v. Sudbury Rand Mines Limited* (1940) O.W.N. 258 and the cases cited therein.)

16. This Board has adopted the same approach in *Napev Construction Limited and Vepan Leaseholds Limited*, [1976] OLRB Rep. March 109. In that case (to simplify a bit) the Bricklayers' union sought to enforce compliance with a provision in its collective agreement requiring an employer to hire only union members or, alternatively, to engage subcontractors who were themselves under a contractual obligation to hire union members. The purpose of this clause was to give union members a preferred right to existing job opportunities. The inevitable result of the proceedings before the Board, and the real object of the complaining trade union, was to force the respondent employer to sever its subcontract with a company which did not hire members of the union, and to either hire union members directly, or subcontract to another company with the appropriate union connection. For the employees of the existing contractor who were not members of the Bricklayers' union, the intent of the proceeding was clear: their jobs were "on the line". If Napev/Vepan was in breach of its contractual obligations they would be put out of their jobs. Accordingly they sought to intervene in the proceedings to support the position of the principal employer. They were unsuccessful. The Board held that they were only commercially or incidentally affected, even though the inevitable result of the proceeding before the Board would be a repudiation of the subcontract and a loss of jobs. An application for judicial review of this decision was dismissed.

17. I do not suggest that the situation in *Napev* is precisely parallel to the situation of the employees in the instant case. But neither is it the same as the position of the employees in *Hoogendoorn* or *Bradley*, who successfully sustained their right to notice and separate representation in the arbitration proceedings there under consideration.

18. In *Hoogendoorn*, an employee refused to authorize the deduction of union dues which the terms of his collective agreement made a compulsory condition of employment. When Hoogendoorn failed to authorize or remit the required dues, and the employer refused to discharge him, the union took a grievance to arbitration alleging a breach of the collective agreement. The hearing, at which the employee was unrepresented, resulted in an award

directing the employer to notify the employee that he must execute and deliver a dues deduction authorization form within seven days or face dismissal. Hoogendoorn complained that there had been a denial of natural justice. The Court agreed. The majority of the Court (Hall, J., Spence, J., and Cartwright, C.J.C. — Ritchie, J. and Judson, J. dissenting) concluded that the whole purpose of the proceeding was to secure Hoogendoorn's discharge. It was not merely an abstract interpretation of a collective agreement clause of general application, nor was the union cast in the role of neutral arbiter of an established scheme of contractual rights. It was clearly ranged in interest against one of the individuals for whom it was the statutory bargaining agent. Thus, Hoogendoorn was entitled to notice and the right to participate.

19. The fact that Hoogendoorn's discharge was the sole object of the arbitration proceeding and that his bargaining agent was adverse in interest, figure prominently in the majority decision of the Court. Cartwright C.S.C. commented:

The reason that I differ from the result [of the minority members of the Court] is that I am unable to regard the arbitration which was held as anything other than an inquiry as to a single question, that is, whether or not the employer was bound to discharge the appellant.

After discussing the then recent Ontario Court of Appeal decision in *Bradley*, the Hall J., writing for the majority, went on to say:

I agree that this represents the actual situation as it developed. I think the learned arbitrator correctly understood what he was adjudicating upon, namely, Hoogendoorn's continued employment and nothing else. His proper understanding of his function in the *ad hoc* arbitration proceeding led him inevitably to ordering Hoogendoorn's dismissal. The arbitration proceeding was unnecessary as between the union and the company. Both fully understood and agreed that the collective agreement required Hoogendoorn to execute and deliver to the Company a proper authorization form for deduction of the monthly union dues being paid by members of the union. Both the company and the union wanted him to do so. The arbitration proceeding was not necessary to determine that Hoogendoorn was required so to do. Both knew he was adamant in his refusal. The proceeding was aimed at getting rid of Hoogendoorn as an employee because of his refusal either to join the union or pay the dues. It cannot be said that Hoogendoorn was being represented by the union in the arbitration proceeding. The union actively took a position completely adverse to Hoogendoorn. It wanted him dismissed.

I can come to no other conclusion but that in the circumstances of this case it was improper for the learned arbitrator to proceed as he did in Hoogendoorn's absence.

I might note, parenthetically that one must be careful to consider the precise situation which was before the Court for its consideration. There is no suggestion, for example, that if a union is prosecuting the grievance of an employee claiming unjust discharge, all the other employees in the unit of lesser seniority are entitled to notice and to participate, simply because, if the grievor is reinstated to his former position on the seniority list, their relative position will be

marginally different. If that were so, every simple discharge grievance could become a multi-party proceeding.

20. In *Bradley*, the Ontario Court of Appeal had before it a case in which an employer had promoted a group of employees and their union had filed a grievance alleging that the promotion was not in accordance with the terms of the collective agreement. The union took the position that another group of employees should have received the promotions instead. An arbitration board agreed with the union's position, and directed that the employees who were initially promoted should be replaced by the grievors, who, in the arbitrator's view, should have been promoted if the terms of the agreement had been properly followed. The Court of Appeal decided that the incumbent employees were entitled to individual notice and separate representation when their union was taking a position adverse in interest to their own. The Court commented:

The present case is one of first impression in this Court. the principle of its decision may be stated as follows: Where two employees or two groups of employees covered by the same collective agreement compete for benefits thereunder which are accorded by the employer to one or to one group only and the disappointed employee or group invoke the grievance machinery to seek redress and their case is taken to arbitration by their bargaining agent (the union party too the collective agreement), it is reversible error on *certiorari* for the arbitrator to make an award in their favour which strips the other employee or group of the benefits in question if the latter have not been given timely notice that the benefits conferred upon them by the employer would be brought directly into question at the arbitration hearing and might be lost as a result thereof.

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A collective agreement is a unique legal institution because, despite the generality of its terms as part of a bargain made between a representative union and an employer, its existence and application result in personal benefits to employees who are covered by it. Once it is accepted, as it must be, that the benefits running to employees may differ according to job classification or seniority ranking (to take two illustrations), and that the representative union is put to a choice between employees who competed for the same preferment as to which it will support against a different choice made by the employer, substantive employment benefits of particular employees are put in issue and they are entitled to protect them if the union will not.

21. It will be seen that the situation in the instant case differs in at least two critical respects. In the first place, the objecting employees here are not opposed in interest to their bargaining agent in respect of the substantive legal issue before the Board — the application of section 68 of the Act to the union's conduct. Their interest is precisely the same as the union's on this point, despite the fact that, as it turned out, the union did not come forward with the "winning defence" that the employees might have expected. Secondly, the object of the complainants' section 89 complaint was not to diminish any rights of their fellow employees contingent upon their accumulated years of service, but rather to assert rights which the complainants argued they would have had under the same collective agreement, but for the

improper conduct of their union bargaining agent. This would not result in the discharge of anyone (as in the case of *Hoogendoorn*) or in the removal of anyone from his existing position (as in the case of *Bradley*). The rights of their other employees were not and are not directly in issue — even though the restoration of the complainants' loss of seniority may result in some improvement in their relative position vis-a-vis other employees, in any future competition for seniority-related benefits under the collective agreement.

22. If this case were to be decided solely on a common-law basis, it might be argued that the objecting employees are only commercially or incidentally, as opposed to directly or legally affected by the Board's decision to restore the complainants to the seniority status they would have had but for the union's breach of the Act. But I do not think it is necessary to decide this case on that basis. It suffices to say that it was the conduct of the employees' bargaining agent which was put in issue, and it was that conduct which directly resulted in an adverse change in the complainants' seniority status relative to that of their fellow employees. In this sense, the other employees in the bargaining unit were the "beneficiaries" of the improvident actions of their bargaining agent which the Board ultimately found to be in breach of section 68 of the Act. By the same token, they are the "losers", to the same degree, when the Board determined that the complainants had been dealt with improperly, and directed that the complainants should be restored to the position they would have been in, had they not acted upon the union's bad advice. It seems to me that in both cases — as "winner" and "loser" — the objecting employees find themselves in the position of supporting the actions of their bargaining agent, with whom they are allied in interest, and whose conduct is directly in issue in a section 68 complaint. In the circumstances therefore, I do not think that each of these employees is entitled to separate notice and representation in the complainants' section 68 complaint. It was sufficient to give notice to the union which had the responsibility of defending the conduct which resulted in a windfall (if minor) benefit to some of the employees whom it represents, and a detriment to the complainants. Notice to the employees' statutory bargaining agent — the respondent — was sufficient notice to the employees themselves. If through error or inadvertence, the union did not take the opportunity to defend its position, that is a burden which must be shared by both the union and its members.

23. For the foregoing reasons, the request for reconsideration is dismissed. The employees are, of course, still free to pursue their own complaint against their bargaining agent for the way in which it represented their interests in the earlier proceeding before the Board.

0704-84-R Dennis Labadie, Applicant, v. Sheet Metal Workers' International Association, Local 235, and Ontario Sheet Metal Workers' Conference, Respondents, v. **Tradesmen Fabricating Ltd.**, Intervener

Employee — Practice and Procedure — Termination — President of company also working as employee and paying union dues — Performing managerial functions within meaning of section 1(3)(b) — Not “employee” for purposes of Act — Not entitled to apply for termination

BEFORE: E. Norris Davis, Vice-Chairman and Board Members I. M. Stamp and H. Kobryn.

APPEARANCES: *M.S.F. Watson and D. J. Laing for the applicant; B. Fishbein and D. Patterson for the respondents; no one for the intervener.*

DECISION OF THE BOARD; August 24, 1984

1. This is an application for a declaration terminating the bargaining rights of the respondent union.

2. The applicant has been a licensed journeyman sheet metal worker since 1972 and a member in good standing of the respondent union since that time. In 1978 he formed a partnership with his wife doing business under the trading name of Tradesmen Fabricating Ltd. At about this time an agreement was entered into between Tradesmen Fabricating and the respondent, signed by the applicant acting for Tradesmen Fabricating, granting a voluntary recognition of the respondent. There was also before us a document dated August 17, 1978 which had been executed between the respondent and three sheet metal firms which is further endorsed by the applicant on behalf of Tradesmen Fabricating. There is no dispute but that the subsequent incorporated company, Tradesmen Fabricating Ltd., is a signatory to the current collective agreement and that the applicant signed such on its behalf. June 1979 the business was incorporated with the applicant and his wife being the sole shareholder and holding one share each. The sole officers and directors of the incorporated company are the applicant, who is president, and his wife who is secretary-treasurer. The company has a 40' x 90' shop in the back of a building which also contains the applicant's residence, and is located in Chatham, Ontario.

3. The nature of work done by the company since its inception has consisted of fifty per cent industrial type structural steel, thirty per cent machinery repair, ten per cent work with round rod and ten per cent sheet metal. Customers consist of industrial plants, and actual work is performed in the company's shop or in the plants. The applicant since 1978 has performed physical work with or without employing others; in 1978 he had two employees and at one time in 1980 had eight employees who were hired for a specific job involving structural steel but no sheet metal work. Between April and December 1983 the Tradesmen Fabricating Ltd. was inactive and during this period the applicant worked for E. G. Baird Ltd. in Windsor till December 1983. The applicant was in receipt of Unemployment Insurance benefits from December 1983 to March 1984.

4. While the applicant was in receipt of Unemployment Insurance benefits a letter on corporate stationary and signed by his wife as “owner/manager” was directed to the respondent dated February 6, 1984. The letter noted that for the preceding fourteen months there had

been no union employees and that "the people in our shop do not wish to be Union". The letter went on,

"From this day forth, please consider us not associated with the Sheetmetal Workers Local 235 and the Windsor Sheetmetal Contractors Assoc. We do not expect ever again to hire Union people."

5. On February 7th, 1984, a letter typed by the applicant's wife and signed by the applicant was directed to the respondent requesting to be considered for a withdrawal card.

6. At the time of these correspondences, the company was inactive and had no employees. The company became active again on March 4th, 1984 when the applicant resumed active employment and a Mr. Bill Johnston was hired the same day. Johnston was hired by the applicant's wife and in the words of the applicant, "I was not there at the time" and "it was her prerogative when I was on Unemployment Insurance.

7. Johnston was hired to do estimating, make customer contacts and blueprints. He was a qualified sheet metal journeyman although not a member of the Union, and is stated to have assisted in physical shop work to the extent of less than 5 per cent of his time. Johnston received a salary of \$300 per week until he left the employment in June 1984. The applicant, from March 4th, 1984 onwards drew \$300 per week. The mix of work done since March 4th we are told remained substantially as it had been between 1978 and 1983.

8. As of the day this application was filed, there were employed, in addition to the applicant and Johnston, three other persons. Two of the three, John Lawther, Jo and Jerry Spearman, neither of whom had ever done any sheet metal work and were not apprentices, journeymen or union members. There was also an Ian Grant who was employed from some time in April to early June 1984 and whose principal job was to drive a truck, work in structural steel welding and on occasion to help the applicant in sheet metal work, which later is said to have comprised of less than five per cent of his time. Grant was not an apprentice, journeyman or union member. The application was prepared and signed in the offices of the applicant's solicitor. The same solicitor acts on behalf of Tradesmen Fabricators Ltd. and prepared and filed an intervention on behalf of the employer.

9. On the date of filing of this application, the applicant was employed in the Tradesmen shop for some six hours building a sheet metal hopper for Great Lakes Ice Co. Grant helped the applicant in this job and in the afternoon the applicant had Johnston "come down" and help him to assemble the hopper.

10. This application is brought under section 57(2)(a) of the Act which provides

57.-(2) Any of the employees in the bargaining unit defined in a collective agreement may, subject to section 61, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit,

(a) in the case of a collective agreement for a term of not more than three years, only after the commencement of the last two months of its operation.

It is to be noted that access to the section is limited to “any of the employees in the bargaining unit defined in a collective agreement” and the respondent raises the threshold question as to whether the applicant falls within that meaning. The respondent argued that the applicant is precluded by section 1(3)(b) of the Act from being deemed to be an employee for the purpose of this application.

11. The evidence establishes that the applicant, as President, acts on behalf of the employer, Tradesmen Fabricating Ltd. in its relations with the respondent union and this is evidenced by the initiation of the voluntary recognition agreement and signing the current collective agreement. It is further evidenced by the applicant having participated on behalf of the employer in grievance settlements with the respondent union, the most recent of which was admitted to have been the week preceding the hearing of this application. Additionally, in respect to persons hired by Tradesmen Fabricating since March 4th, the applicant either hired such individuals or authorized their hiring by Johnston. The Board can only conclude that the applicant is a person exercising managerial functions within the meaning of section 1(3)(b) of the Act. The applicant does not dispute that he is a part of management but takes the position that he nonetheless is an employee in the bargaining unit as defined in the collective agreement.

12. The collective agreement contains no recognition clause but in sections 2.6 and 2.8 defines “employee” and “member”. The parties before us were in agreement that, deriving from these sections, the bargaining unit is properly described as

“All certified journeymen and sheet metal workers or registered apprentices, as well as sheeter/decker, welder, sheeters’ assistant and material handler engaged in the sheeting and decking segment of the sheet metal industry, and all probationary employees recognized by the Local Union and employed in the shop or on the job site except as otherwise specifically provided in the collective agreement in the Province of Ontario.”

It is to be noted that there are no references to any exclusions, managerial or otherwise, from the bargaining unit as defined by the parties. It is argued by the applicant that the applicant is an employee under the collective agreement, required to be a member of the union and to pay dues and that ordinary fairness and even-handed treatment require that he be accorded the same rights under the *Labour Relations Act* as are accorded to other employees. We are referred to the Board’s approach in the decision of *Culliton Bros. Limited*, [1982] OLRB Rep. 339. The Board in that case was dealing with the right of the employees who were “swept in” to coverage by the collective agreement by section 137(2) of the Act to be considered as employees in the bargaining unit despite their non-membership in the union. The Board distinguished the situation from the rationale in the *April Waterproofing* case in that there was “no positive action by the employer which would raise any concerns or call into play the reasoning of the Board’s panel in *April Waterproofing* and went on to conclude that despite the lack of union membership, in view of the circumstances of having been swept in to the bargaining unit, it would not be reasonable to treat them as other than employees in the bargaining unit for purposes of an application for termination.

13. We are urged to similarly apply the same type of fairness and even-handed treatment in finding the applicant here to be an employee in the bargaining unit. In order to do so, however, it would require the Board to make a finding that despite section 1(3)(b) of the Act, the applicant is to be treated as an employee for the purposes of section 57(2)(b) of the Act. To do so in

the instant circumstances it to ignore the underlying purpose of section 1(3)(b) which is well set out in the Board's decision in *Oakwood Park Lodge* [1982] OLRB Rep. Jan. 1984 in paragraph 7 as follows:

7. The purpose of section 1(3)(b) is to ensure that persons who are within a bargaining unit do not find themselves faced with a conflict of interest as between their responsibilities and obligations as managerial personnel, and their responsibilities as trade union members or members of the bargaining unit. Collective bargaining, by its very nature, requires an arm's length relationship between the "two sides" whose interests and objectives are often divergent. Section 1(3)(b) ensures that neither the trade union, nor the employer and its management team, need be concerned that its members will have "divided loyalties". This purpose has been succinctly stated by the British Columbia Labour Relations Board in *Corporation of the District of Burnaby*, [1974] 1 Can. LRBR 1 at page 3:

"The explanation for this management exemption is not hard to find. The point of the statute is to foster collective bargaining between employers and unions. True bargaining requires an arm's length relationship between the two sides, each of which is organized in a manner which will best achieve its interests.

14. In the construction industry it is not too unusual to encounter circumstances where a single person is both a manager and a worker. The issue was raised in the case of *Peter Walter Dow*, [1981] OLRB Rep. June 692, involving the issue of whether an owner-operator was an employee in the bargaining unit, and the Board in its decision, said at para. 31 "moreover the complainant, having the dual status of manager and worker would run afoul of section 1(3)(b)." Also in the *G. LaVictoire Bros. Ltd.*, case [1982] OLRB Rep. April 590, the president of the employer was the sole employee performing carpentry work in a particular site, and a grievance was filed that such was in violation of the agreement. The Board found that the president was to be regarded "as a managerial person and not an 'employee' of the firm either for the purposes of the *Labour Relations Act* or for the purpose of the collective agreement".

15. In the case of *Ed Walker Electric*, [1970] OLRB Rep. March 34 what was at issue was whether two persons who were shareholders and directors, attended director's meetings at which capital expenditures, yearly audit, labour relations, sales forecast et cetera, were discussed should be included in a bargaining unit in which they performed work similar to other bargaining unit employees. The Board in determining otherwise, said

"on the basis of the evidence alone, notwithstanding the nature of the work which they perform, we find that . . . exercise managerial functions and are employed in a confidential capacity respecting labour relations . . .".

That decision was approved and followed in the *Massi Construction Ltd.*, case Board File No. 1036-83-R. While those cases involved applications for certification, we would find it strange if a person not found to be an employee for purposes of certification would nonetheless be found to be an employee under the Act for the purposes of an application under section 57(2)(a).

16. In the instant case, we are dealing with the right of a person to raise and have tried the issue of representation by the bargaining agent. Section 57, in its entirety, limits the raising

of that issue to "any employee" in the bargaining unit. Section 1(3)(b) sets forth that "for the purposes of this Act, no person shall be deemed to be an employee . . . who . . . exercises managerial functions . . ." The applicant is clearly one who falls within the meaning of section 1(3)(b) and as such cannot have access to section 57(2)(b).

17. The application must therefore be dismissed.
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3113-83-U United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 552, Applicant, v. **The Board of Education for the City of Windsor**, Respondent

Evidence — Lock-Out — Practice and Procedure — Witness — Whether cross-examination allowed as hostile or adverse witness — Respondent moving for dismissal at end of applicant's case put to irrevocable election as to calling evidence — All of respondent's plumbers "laid-off" without explanation — Whether lock-out — Whether motive element in lock-out definition satisfied

BEFORE: D. E. Franks, Vice-Chairman.

APPEARANCES: *S. B. D. Wahl and J. Boyle for the applicant; Leonard P. Kavanaugh, Q.C., George W. King, Robert A. Dureno, Eric J. Laub and Wayne T. Mickle for the respondent.*

DECISION OF THE BOARD; August 8, 1984

1. By a decision dated May 11, 1984 this Board rejected the respondent's motion to "non-suit" the applicant, and accordingly, declared that the respondent had engaged in an unlawful lock-out and made certain directions with respect to that unlawful lock-out. Herein are the detailed reasons for that decision.

2. The lock-out itself occurred on March 30, 1984 when all four members of the applicant trade union employed by the respondent Board of Education were "laid-off". Each of the four employees concerned received a letter from the respondent stating quite simply:

"Please be advised that effective at noon today, March 30, 1984 you are laid off from employment with the Board of Education for the City of Windsor."

The employees also received a standard record of employment form of Employment and Immigration Canada for unemployment insurance purposes. This lists as the reason for issuance "lay-off".

3. No explanation for the lay-off was given to the employees or the applicant at that time, nor was any explanation offered at the hearing in this matter. The four plumbers affected by this application, namely, Murray Inverarity Sr., Murray Inverarity Jr., Paul Lanoue and William Boroski constitute the total bargaining unit for which the trade union has bargaining

rights. It is also clear that these employees were long-standing regular employees of the respondent. Mr. Inverarity Sr. had been employed by the respondent for some 23 years. Mr. Inverarity Jr. has had the shortest term of employment with the respondent, namely, about 2 years. Further, the evidence is clear and undisputed that there remains a substantial amount of work of the type normally done by these four employees. It appears that this work, from March 30, 1984 to the time of the hearing, was being performed by local Windsor mechanical contractors. These contractors appear to have a bargaining relationship with the applicant trade union. Of interest, however, was the clear evidence that at the time of the sub-contracting of the work to these mechanical contractors there had been no price negotiated for the performance of such work between the contractors and the respondent. This was apparently because the decision to sub-contract the work out was done on such short notice.

4. Although the lay-off of the four employees in question was precipitous and unexplained, it occurred in the context of a very long relationship between the applicant and the respondent. The evidence concerning the background relationship between the parties was tendered in evidence by counsel for the applicant at the commencement of the hearing. This evidence was largely in the form of documents filed with this application, and identified by Mr. Boyle, the business manager for the applicant trade union. Counsel for the respondent objected to the introduction of these documents in the present proceedings since these documents were also the subject matter of other proceedings and before another panel of this Board. The Board, however, admitted the documents as forming the context in which the "lay-off" of the four employees occurred.

5. The relationship between the applicant local and the respondent began with a certificate by this Board dated February 27, 1967 which certified the applicant union as bargaining agent of "all plumbers and plumbers' apprentices in the employ of the Board of Education for the City of Windsor, save and except foremen and persons above the rank of foreman". It appears that subsequent to that certification on July 19, 1968 the applicant and the respondent became party to a collective agreement which appears to be a modification of a standard form of construction industry agreement negotiated between the applicant trade union and mechanical contractors. Thus, the agreement filed as exhibit #2 in this matter is effective from January 1, 1966 to April 30, 1969 wherein the Board of Education for the City of Windsor is referred to as the employer. Subsequently, (exhibit #3 in these proceedings) there was a document on the stationery of the Board of Education for the City of Windsor, dated October 8, 1971 which is signed on behalf of the Board but also signed on behalf of Local 494 of the Carpenters' Union and the applicant trade union and that document reads as follows:

"It is agreed between the parties, subject to the approval of their principals, the following is the basis for arriving at base hourly rate and for fringe benefits:

1. Board of Education Base Rate to be 85% of the Building Trade Base rate plus Welfare Fund cost, Pension Fund Cost, and S.U.B. cost where applicable.
2. Permanent employees will receive the same Fringe benefits as provided to the Canadian Union of Public Employees."

It appears that these documents formed the basis of the relationship between the applicant and the respondent for some years. The next exhibit is a letter dated March 30, 1982 from

the Employee Relations Administrator for the Board of Education to Mr. Jerry Boyle the business manager of the applicant trade union. That letter reads as follows:

“At the present time there is no Collective Agreement in existence with respect to Plumbers employed by the Board of Education for the City of Windsor, other than an understanding that the Board will pay its Skilled Trade employees 85% of the negotiated trade rate(s).

We are desirous to meet for the purpose of negotiating a Collective Agreement commencing May 1, 1982.

It would be appreciated if you could contact me at 255-3301 for the purpose of establishing a mutually satisfactory time and place to discuss this matter.”

From this point on it appears that relations between the applicant and the respondent became complicated and strained. Indeed, much of this matter is before another panel of this Board which will resolve the state of the relationship between the parties. For the present purposes it is sufficient to simply recount the matters that are not in dispute between the parties. The respondent Board of Education commenced negotiating in 1982 with a number of local building trades unions in the Windsor area, namely, the bricklayers, carpenters, electricians, painters, labourers, as well as the applicant plumbers' union. Proposals were exchanged during 1982 which eventually resulted in collective agreements with the trades other than the applicant trade union. The applicant, it appears, withdrew from those negotiations.

6. Subsequently, in December of 1982 the applicant filed an application for certification with respect to certain employees of the respondent. That resulted in a decision of May 18, 1983 in which the Board, pursuant to section 144 of the *Labour Relations Act* issued two certificates to the applicant, one with respect to plumbers and plumbers' apprentices in the industrial, commercial and institutional sector, and the other for plumbers and plumbers' apprentices in sectors other than the industrial, commercial and institutional sector. It is not disputed between the parties that the effect of the certification of the applicant in the ICI sector binds the respondent by operation of law to the provincial agreement for plumbers and plumbers' apprentices in the ICI sector. With respect to the totality of the bargaining relationship between the applicant and the respondent (in relation to sectors other than the ICI sector and for employees other than employees in the construction industry), it is not necessary to determine the relationship between the applicant and the respondent in these proceedings. All that need be noted here is that in July of 1983 there were meetings between representatives of the applicant and the representatives of the respondent. The positions of the various parties at those meetings, and the legal consequences resulting therefrom are part of another complaint before another panel of this Board. For the present purposes, however, we need only note in evidence that the parties, in fact, took different bargaining positions and were unable to reach any final agreement with respect to their legal rights resulting from the Board's certificate and the previous bargaining relationship between the parties.

7. One other piece of background should be noted. The respondent was subject to the *Inflation Restraint Act*. The effect of this legislation was a substantial issue between the applicant and the respondent and on December 21, 1983 the Inflation Restraint Board issued the following decision:

“On December 15, 1983, the Inflation Restraint Board considered an

application of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 552, dated September 29, 1983, concerning the status of certain of its members under the Act.

The applicant has requested the Board to take the following action:

1. to decide whether or not certain of its members are employees of the Windsor Board of Education within the meaning of the Act;
2. to recommend to the Lieutenant Governor in Council that its members be exempted from the provisions of Part II of the Act if they are found to be employees of the Windsor Board of Education;
3. in the alternative, to determine a compensation rate increase for the subject employees, pursuant to Clause 14(1)(a) of the Act, for the period of May 1, 1982 to April 30, 1983, the transition year of the employees' compensation plan.

In regard to the question of whether or not the applicant's members are employees within the meaning of the Act, the Board referred the applicant to Clauses 4(a) and 6(1)(c) of the Act. On this basis, the Board DECIDED that the subject individuals are employees of the Windsor Board of Education and are subject to the provisions of Part II of the Act.

In considering the matter of a recommendation for exemption from Part II of the Act, the Board DECIDED that it would not make a recommendation to the Lieutenant Governor in Council for exemption as requested by the applicant.

In the matter of the compensation rate increase for the period May 1, 1982 to April 30, 1983, the Board DECIDED to permit an increase in compensation rates for the subject employees of 5 per cent, effective May 1, 1982.

The Board noted that the compensation plan of the subject employees entered its control year on May 1, 1983, at which time compensation rates are to be increased by 5 per cent and the other provisions of Section 12 apply."

The respondent Board of Education has indeed applied the *Inflation Restraint Act* to the wages of the four plumbers.

8. Another fact clearly in evidence is that as a result of the foregoing events the applicant in the present matter filed a complaint, Board File No. 0866-83-U. It is in this context that the four plumbers were "laid off". The complainant alleges that this constitutes an unlawful lock-out and the substance of the motion for a non-suit brought by the respondent is that the applicant has not proven the necessary ingredients of a lock-out.

9. At the hearing in this matter, counsel for the applicant sought to adduce direct evidence of the intention of the employer in laying off the four employees. The theory put forth

by the applicant was that Mr. Hardcastle, the President of the CUPE local that bargains with the respondent for various caretaking and maintenance employees, had a number of discussions with Mr. Boyle and the employees in which he purported to deliver a message from the employer to the employees concerning their lay-off and how to resolve the problem. Accordingly, the applicant tendered evidence in the examination of its witnesses, Boyle and Inverarity Sr. and Inverarity Jr. concerning certain statements made by Mr. Hardcastle attributed to a Mr. Laub a managerial employee of the respondent. Counsel for the respondent quite properly objected to this evidence when it was tendered as hearsay. The Board noted the objection by counsel but deferred ruling on the matter pending the testimony of Mr. Hardcastle. Obviously, if Hardcastle was delivering an offer by Laub to the employees, such an offer would not be hearsay since offers are not capable of being either true or false.

10. Eventually Mr. Hardcastle was called as a witness by counsel for the applicant. In his direct evidence, Mr. Hardcastle denied the statements attributed to him by the applicant's other witnesses. Counsel put the evidence tendered by the other witnesses specifically to Mr. Hardcastle and he specifically denied having made the statements attributed to him. Counsel for the applicant then sought permission to cross-examine Mr. Hardcastle. After hearing the representations of the parties I allowed the motion to cross-examine Mr. Hardcastle with reasons for that decision to be given later.

11. The motion to cross-examine Mr. Hardcastle was based on the proposition that as a witness he was either adverse or hostile and that, accordingly, counsel, although he called Mr. Hardcastle as a witness, was therefore entitled to cross-examine him. In my opinion the motion to cross-examination was entitled to succeed on both grounds of being adverse and being hostile. First, the applicant had established in evidence previous contradictory statements by the witness. Further, the witness had been confronted with these statements and they had been denied. See section 24 of the *Evidence Act*, R.S.O. (1980) c. 145 and *Wawanesa Mutual Insurance Company vs. Haines*, [1961] O.R. 495. I am, however, also of the view that the witness was also hostile in what might be called in a more classical sense of the word "hostile", that is, in his manner of giving evidence Mr. Hardcastle betrayed a desire not to tell the truth. (See, *Boland vs. the Globe and Mail Limited* 29 D.L.R. (2d) 401 at 422.) Thus, Mr. Hardcastle's denials of the statements attributed to them were themselves evasive. The witness in referring to conversations which took some time described himself as talking about "generalities". He persisted in this form of answer to the point where he was, in my view, not responsive to the questions and not prepared to tell the "whole truth" concerning the conversations he had with Mr. Boyle, Mr. Inverarity Jr. and with the group of employees.

12. The motion to cross-examine Mr. Hardcastle having been allowed, counsel for the applicant proceeded to cross-examine Mr. Hardcastle at length. The result of this cross-examination, however, was simply a reiteration of the denials already elicited from the witness.

13. The net result, however, is that whether or not I am prepared to believe Mr. Hardcastle's denials, the whole matter falls as inadmissible hearsay evidence. That is, there is no evidence of a message having been sent from the employer to the employees concerning the employer's intention with respect to the lay-off and what the employees could do about the lay-off. The Board ruled on this matter at the conclusion of Mr. Hardcastle's testimony.

14. At the conclusion of the applicant's case counsel for the respondent moved to dismiss the application. Counsel asked for a ruling on the motion but also requested that in the event that the motion was unsuccessful he be allowed to call evidence herein. The Board refused to

allow counsel his latter request and put counsel to the irrevocable election as to whether he chose to call evidence. This election being put to the respondent, counsel for the respondent elected not to call evidence, and accordingly, the Board heard the argument on the "non-suit".

15. In the course of these proceedings, counsel for the respondent conceded in these proceedings that if a lock-out occurred it occurred at a time when such a lock-out would be unlawful within the provisions of the Ontario *Labour Relations Act*. The respondent, however, denies that there was a lock-out and specifically argues that there is no evidence before this Board to find a lock-out within the meaning of section 1(1)(k) of the *Labour Relations Act*. That section reads as follows:

"'lock-out' includes the closing of a place of employment, a suspension of work or a refusal by an employer to continue to employ a number of his employees, with a view to compel or induce his employees, or to aid another employer to compel or induce his employees, to refrain from exercising any rights or privileges under this Act or to agree to provisions or changes in provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, an employers' organization, the trade union, or the employees."

Thus, the respondent denies that there has been any evidence that the School Board closed or that there has been a suspension of work or a refusal by an employer to continue to employ a number of his employees. However, it is clear on the facts that the "lay-off" on March 30th constitutes a refusal to continue to employ all of the members of the applicant in its employ. We can see no merit in this first part of the respondent's argument.

16. The second part of the respondent's argument is that, even if there is a refusal by an employer to continue to employ a number of his employees within the meaning of the definition of the term "lock-out" there has been no evidence relating to the purpose of such conduct, i.e. "with a view to compel or induce his employees . . . to refrain from exercising any rights or privileges under this Act or to agree to provisions or changes in provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, an employers' organization, the trade union, or the employees". Counsel for the respondent relied heavily on the decision of the Board in *Rondar Services Limited* [1977] OLRB Rep. Oct. 655. In that case, like the present case, the employer chose not to call evidence and in the circumstances the Board found that the applicant had not established that the refusal of the employer to continue to employ certain employees was a lock-out. In that case the Board placed a great emphasis on the irrevocability of a decision by the employer on the theory, presumably, that a revocable decision is more likely designed to influence the employees:

"13. A reading of the statutory definition in light of the public policy referred to above establishes that the definition is designed to cover employer sanctions motivated by a desire to compel or induce an alteration or modification of behaviour, i.e. an agreement respecting terms and conditions of employment or a refraining from the exercise of rights under the Act. An employer is not prohibited from laying-off, contracting-out or going out of business during the periods when it is unlawful to lock-out. Rather, the definition has been formulated to catch economic sanctions which are designed to influence employee behaviour. The use of the verb "refrain" which means to "hold oneself back" or "to keep oneself from doing", and

the reference to an agreement respecting terms and conditions of employment bespeak a continuing but altered employment relationship. The motive which brings a refusal to continue to employ within the definition, therefore, is one directed at altering or modifying the employment relationship to the extent that employees refrain from exercising rights or agree to provisions in terms and conditions of employment.

14. In the line of cases relied upon by the company the Board has looked to whether or not the objective acts of the employer (i.e. the refusal to continue to employ etc.) were revocable or irrevocable. If revocable, then clearly an inference can be drawn as to the subjective element of the definition (i.e. the compelling or inducing to refrain from exercising rights etc.) and a finding made that the refusal to continue to employ is being used as a lever to effect an alteration or modification of employment behaviour within the meaning of lock-out as set out in section 1(1)(i) of the Act. (See *Harry Woods Transport* case, [1976] OLRB Rep. July 341 where such an inference was drawn.) If, on the other hand, the evidence establishes that the company's decision to refuse to continue to employ is irrevocable, then it is more difficult to draw the inference that the sanction is designed to effect a modification or alteration or employment behaviour in those whom the employer has refused to continue to employ, and indeed, in a number of cases a finding that the decision of the company was irrevocable has led to a dismissal of the application. (See *Livingston Transportation Limited* case (*supra*).)

15. Does this mean that in order to establish that a lock-out has occurred a union must establish that the decision taken by the company in respect of those it refuses to continue to employ was a revocable one? The answer is no. Whereas the objective element of the definition encompasses "a refusal by an employer to continue to employ *a number of his employees*", the subjective element requires that the refusal be "with a view to compel or induce *his employees* to refrain from exercising any rights or privileges under the Act. . ." The definition contemplates and catches an irrevocable decision taken by an employer to refuse to continue to employ *some* of his employees with a view to compel or induce *other* employees to refrain from exercising rights under the Act etc. This is clear from a reading of the definition and fits within the policy considerations referred to above. It is within this context that the statement in the *Milrod* decision (*supra*) must be read. If it can be shown that an employer's refusal to continue to employ a number of his employees is rooted in an anti-union animus and if there are other employees who may be influenced within the meaning of the definition, an inference can be drawn that the motive for the employer's action falls within the statutory definition of "lock-out". It can be inferred that the employer's decision is designed, at least in part, to modify or alter the behaviour or conduct of those employees who remain within his employ.

16. The onus is upon the union to establish the existence of a lock-out. It can satisfy the onus by establishing that the economic sanctions are revocable thereby allowing the Board to draw the inference that the sanctions have been designed to modify employee behaviour within the meaning of the

definition. It can also satisfy the onus by establishing that the sanction, although irrevocable, was motivated by an anti-union animus, thereby allowing the Board to draw the inference that the sanctions were intended to modify the behaviour of employees other than those directly affected. The "reverse onus" which requires an employer to satisfy the Board that he has not acted out of an anti-union animus in certain unfair labour practice complaints does not prevail in a section 83 application. In the *Milrod* case (*supra*), an application under section 83, the union was unable to discharge the onus of establishing an anti-union motive. Having regard to the different placement of the onus in a section 79(4a) complaint and to the fact that in certain circumstances an employer's irrevocable refusal to continue to employ for an anti-union reason will not fall within the definition of lock-out, there will be situations in which the Board dismisses an application under section 83 which would succeed if brought under section 79 of the Act."

The respondent in the present case argues that there is no evidence of revocability and, therefore, the applicant has not established that the respondent has attempted to compel or induce its employees to do anything. The *Rondar Services Limited, supra*, decision was quoted extensively in another case, *Doral Construction Limited* [1980] OLRB Rep. March 310 where in dismissing the application the Board noted:

"Since the scope of the statutory definition requires that, for an action to constitute a lock-out, an underlying motive for the action must be to compel or induce an alteration either in employee behavior or conditions of employment (i.e. to extract a concession from employees), an irrevocable decision cannot fall within the definition unless it is established that its purpose was to compel or induce those employees not directly affected by the decision to refrain from exercising rights under the Act (or alter working conditions). There is no evidence before me that the respondents' action was devised for the purpose of compelling or inducing other employees to forego rights or privileges under the Act or to agree to an alteration of conditions of employment. In other words, there is no evidence that the respondents' actions were devised for the purpose of "bargaining" a concession from employees in respect of rights and privileges under the Act or employment conditions. Therefore I must conclude that the respondents' actions do not constitute a lock-out within the meaning of section 1(1)(i) of the Act."

17. Both the *Rondar* and the *Doral* cases, *supra*, deal with the circumstances in which the Board will, from the circumstances of the case, infer that the employer has the requisite motive behind his action to constitute a lock-out within the meaning of section 1(1)(k) of the Act. In the present case there is no direct evidence of any communication by the employer as to the employees that would exhibit an intention by the employer to make the employees or the union "change its mind" about something. The question is, however, on the evidence before me, can I conclude that the events of March 30th were intended to convey a message to the employees? In the absence of any explanation from the employer I am inclined to the view that the lay-off of the employees was a very powerful message to both the union and the employees and that it was intended to induce or compel them to change their position in bargaining and in the section 89 complaint referred to above.

18. First, I should point out that in the present case the analysis referred to in the *Doral* and *Rondar* cases, *supra*, is largely irrelevant. We have no evidence as to whether the decision is revocable or irrevocable. It would appear that the only thing before this Board is the argument made by counsel for the respondent that the decision stems from a decision of the respondent Board of Education. Such a decision may or may not be revocable. We simply have no evidence on that matter. That, however, in the context of a present case simply means that the union cannot point to a revocable decision as evidence of a motive and the respondent cannot point to an irrevocable decision as evidence of a lack of motive. Therefore, the cases relied upon by the respondent do not address the problem in the present case.

19. The facts in the present case are that the applicant and the respondent have since the letter of March 30, 1982 from the Employee Relations Administrator to Mr. Boyle quoted above, been arguing about the collective bargaining relationship between them. This has at times been a very heated and even bitter argument, as demonstrated by the different positions taken by the parties over the *Inflation Restraint Act*. This relationship has culminated in the other proceedings before this Board (Board File 0866-83-U). It is in this context of a disputed relationship between the parties that the respondent *without explanation* "laid off" all of the plumbers represented by the applicant. What other possible message can there be in this conduct but a statement to the employees to get their trade union to change its position *vis-a-vis* the respondent Board of Education? Indeed, this was exactly the way the employees interpreted these events. The evidence of Mr. Inverarity Sr. gives a good example of this reaction by the employees. When he reported to the Unemployment Insurance office he was questioned about the unusual manner in which the Record of Employment form had been completed and was asked why he was laid off. His answer, and it was still his position when he was giving evidence, was that he didn't know "other than it must have something to do with 'the union'". Given the context in which these events occurred this is a thoroughly reasonable conclusion by Mr. Inverarity Sr., and I am of the view it was the conclusion intended by the employer, and in the absence to any evidence to the contrary I am of the view that it was the result intended by the respondent employer.

20. For the foregoing reasons, I am of the view that the applicant has demonstrated a refusal by the respondent to continue to employ a number of its employees with a view to compel or induce them to refrain from exercising rights or privileges under this Act. Thus, the applicant has demonstrated a lock-out which is unlawful under the *Labour Relations Act*, the conditions precedent to a lawful lock-out having not been fulfilled.

21. I feel constrained to point out that the inference that there was a lock-out is in no small measure related to the failure of the employer to explain its conduct in the present case. Not only was no explanation given to the employees, leaving them to form their own conclusions, but counsel for the respondent chose not to call any evidence, leaving this Board to form its own conclusions concerning to respondent's motivation without any explanation from the party which is clearly in the best position to know and to explain precisely what that motivation was. Counsel for the respondent argued in passing that if one took the position that the provincial agreement relating to industrial, commercial and institutional construction was applicable, that that collective agreement contemplates sub-contracting and the employer was simply exercising a right under that collective agreement. While this argument might have been open to the employer had it called evidence of that intention, it is, in the circumstances of the present case, merely speculation. It does not clothe the conduct of the employer with good faith. The employer in the present case chose not to lead evidence concerning the contracting out arrangements

and, therefore, must be presumed to have intended the natural consequences of its actions, as described in the preceding paragraph.

22. For the foregoing reasons, the Board hereby confirms its decision of May 11, 1984 in which it declared that the respondent has engaged in an unlawful lock-out and made certain directions with respect to that unlawful lock-out.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JULY 1984

BARGAINING AGENTS CERTIFIED

No Vote Conducted

2388-83-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46, (Applicant) v. The Municipality of Metropolitan Toronto and the Metropolitan Toronto Housing Company Limited, (Respondent) v. The Metropolitan Toronto Civic Employees Union, Local 43, Canadian Union of Public Employees, (Intervener).

Unit #1: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices employed by the Municipality of Metropolitan Toronto and the Metropolitan Toronto Housing Company Limited on construction projects in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen, persons above the rank of non-working foreman, and persons covered by a subsisting collective agreement." (28 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices employed by the Municipality of Metropolitan Toronto and the Metropolitan Toronto Housing Company Limited on construction projects in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen, and persons above the rank of non-working foreman, and persons covered by a subsisting collective agreement." (28 employees in unit).

2581-83-R: Retail Clerks Union, Local 409, (Applicant) v. F. W. Woolworth Co. Limited, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of the respondent in its retail stores in the Municipality of Kenora, Ontario, save and except assistant store managers, persons above the rank of assistant store manager, personnel manager, management trainee, office staff, service desk clerks, persons employed for not more than 24 hours per week and students employed during the school vacation period." (40 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent employed for not more than 24 hours per week and students employed during the school vacation period in its retail stores in the Municipality of Kenora, save and except assistant store manager, persons above the rank of assistant store manager, personnel manager, office staff and service desk clerks." (29 employees in unit). (*Having regard to the agreement of the parties*).

2704-83-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 91, affiliated with

the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Dufresne Piling Co. (1967) Ltd., (Respondent).

Unit: "all truck drivers in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell exclusive of those employed in the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (15 employees in unit).

0045-84-R: United Brotherhood of Carpenters and Joiners of America, Local Union 93, (Applicant) v. Albert Lalonde, (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (11 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (11 employees in unit).

0103-84-R: Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers Express and Station Employees, (Applicant) v. Ontario Northland Transportation Commission (Telecommunications Branch), (Respondent).

Unit: "all employees of the respondent in its Telecommunications Branch, inside and outside plant operations, commercial telegraph operations and traffic operations, save and except technical assistants, outside plant foreman, maintenance foreman, chief operator, those above the rank of technical assistant, outside plant foreman, maintenance foreman and chief operator, and those clerical employees covered by a subsisting collective agreement." (108 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

0312-84-R: United Food and Commercial Workers International Union, AFL-CIO-CLC, (Applicant) v. Flavour Land Beef Limited, (Respondent).

Unit: "all employees of the respondents at Kitchener, save and except foremen, those above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (5 employees in unit).

0313-84-R: United Food and Commercial Workers International Union AFL-CIO-CLC, (Applicant) v. Pacific Labour Services Ltd., (Respondent).

Unit: "all employees of the respondents at Kitchener, save and except foremen, those above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (47 employees in unit).

0358-84-R: United Brotherhood of Carpenters and Joiners of America, Local 2041, (Applicant) v. J. R. Noel Plastering Ltd., (Respondent) v. Labourers' International Union of North America, Local 527, (Intervener #1) v. Operative Plasterers and Cement Masons' International Association, Local 124, (Intervener #2).

Unit: "all employees of the respondent in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, engaged in the installation and erection of acoustical and drywall systems, save and except non-working foremen and persons above the rank of non-working foreman." (7 employees in unit).

0369-84-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Applicant) v. Simpsons Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent at its Heavy Goods Distribution Centre, 100 Metropolitan Road in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, main office personnel located on the mezzanine floor, security staff, drivers and vehicle fleet maintenance personnel, persons regularly employed for not more than twenty-four hours per week, and students employed during the school vacation period.” (123 employees in unit). (*Clarity Note*).

0422-84-R: Ontario Public Service Employees Union, (Applicant) v. Niagara South Board of Education, (Respondent).

Unit: “all office and clerical employees of the respondent in Niagara South, save and except the secretary to the Superintendents of Program, Business Affairs, Special Services and Operations, the Recording Secretary, the Staff Relations Secretary, the Administrative Clerk — Benefits, the Administrative Assistant to the Director of Education, persons above the rank of administrative assistant, supervisors and persons above the rank of supervisor.” (210 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

0436-84-R: The Canadian Union of Public Employees, (Applicant) v. The Ajax, Pickering and Whitby Association for the Mentally Retarded, (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent in the Municipalities of Ajax, Pickering and Whitby save and except the Program Supervisor, the secretary to the Executive Director, the secretary to the Director of Vocational Services, the secretary to the Director of the Emperor Street Resource Centre, supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (24 employees in unit).

0514-84-R: International Brotherhood of Electrical Workers Local Union 353, (Applicant) v. The Metropolitan Toronto Housing Company Limited, (Respondent) v. Canadian Union of Public Employees, Metropolitan Toronto Civic Employees Union, Local 43, (Intervener).

Unit #1: “all electricians and electricians’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen, persons above the rank of non-working foreman, and persons covered by subsisting collective agreements.” (82 employees in unit).

Unit #2: “all electricians and electricians’ apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen, persons above the rank of non-working foreman, and persons covered by a subsisting collective agreement between the respondent and the intervener.” (82 employees in unit).

0518-84-R: International Brotherhood of Painters and Allied Trades — Local Union 1891, (Applicant) v. A. J. Bolla Protective Coatings & Decorating Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit #1: “all painters and painters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (12 employees in unit).

Unit #2: “all painters and painters’ apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (12 employees in unit).

0566-84-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Applicant) v. Simpsons Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at 700 Lawrence Avenue West in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, building engineer, security staff, office and clerical staff, Lawrence Avenue sales room retail staff, drivers and vehicle fleet maintenance personnel, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (370 employees in unit).

0676-84-R: Ironworkers District Council of Ontario, (Applicant) v. Lebrun Constructors Ltd., (Respondent).

Unit #1: "all ironworkers and ironworkers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (7 employees in unit).

Unit #2: "all ironworkers and ironworkers' apprentices in the employ of the respondent in the District of Kenora including the Patricia portion, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (7 employees in unit).

0693-84-R: United, Cement, Lime, Gypsum and Allied Workers International Union, A.F.L., C.I.O., C.L.C., (Applicant) v. Kawartha Moulding Limited, (Respondent).

Unit: "all employees of the respondent employed at 400 Plastics Road, Peterborough, Ontario, save and except foremen and supervisors, persons above the rank of foreman and supervisor, office and sales staff, quality control department, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (31 employees in unit). (*Having regard to the agreement of the parties*).

0694-84-R: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. Hull-Thomson Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Windsor, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 243 hours per week and students employed during the school vacation period." (45 employees in unit). (*Having regard to the agreement of the parties*).

0717-84-R: Ontario Secondary School Teachers' Federation, (Applicant) v. The Haldimand Board of Education, (Respondent).

Unit: "all occasional teachers employed by the respondent in its secondary school panel in the District of Haldimand, save and except persons covered by subsisting collective agreements." (60 employees in unit). (*Clarity Note*).

0718-84-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC, (Applicant) v. T. Eaton Company Limited, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of the respondent at its retail store at 645 Commissioners Road West, London, save and except sales managers, persons above the rank of sales manager, office and clerical staff, management trainees, personnel supervisor, security staff, medical services nurse, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period and students employed on a cooperative programme with a school, college or university." (6 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent at its retail store at 645 Commissioners Road West, London, regularly employed for not more than twenty-four hours per week and students employed during the

school vacation period, save and except sales managers, persons above the rank of sales manager, office and clerical staff, management trainees, personnel supervisor, security staff, medical services nurse and students employed on a cooperative programme with a school, college or university.” (2 employees in unit). (*Having regard to the agreement of the parties*).

0724-84-R: Canadian Paperworkers Union, (Applicant) v. Acco Canadian Company Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period and students employed on a co-operative training program with an educational institution.” (128 employees in unit). (*Having regard to the agreement of the parties*).

0742-84-R: Teamsters Local Union No. 880, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Steel Cylinder Manufacturing Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent at Tilbury, Ontario, save and except supervisor, those above the rank of supervisor, clerical, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.” (15 employees in unit). (*Having regard to the agreement of the parties*).

0758-84-R: Bakery, Confectionery & Tobacco Workers International Union, Local 181, (Applicant) v. Steeles Bakery Limited, (Respondent).

Unit: “all employees of the respondent in the Town of Vaughan, Ontario, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff and persons covered by a subsisting collective agreement.” (13 employees in unit). (*Having regard to the agreement of the parties*).

0767-84-R: The Dufferin County Board of Education Secretarial/Clerical Association, (Applicant) v. The Dufferin County Board of Education, (Respondent).

Unit: “all office and clerical employees employed by the respondent, save and except the Secretary to the Director, Secretaries to the Superintendents, Secretary to the Personnel Administrator and Supervisor of Finance, Secondary School Head Secretaries, and persons above those ranks.” (38 employees in unit). (*Having regard to the agreement of the parties*).

0771-84-R: Hotel Employees and Restaurant Employees Union, Local 75, (Applicant) v. Canada Catering Co. Limited, (Respondent).

Unit: “all employees of the respondent at 969 Eastern Avenue, in the Municipality of Metropolitan Toronto, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff.” (11 employees in unit). (*Having regard to the agreement of the parties*).

0772-84-R: Hotel Employees and Restaurant Employees Union, Local 75, (Applicant) v. Canada Catering Co. Limited, (Respondent).

Unit: “all employees of the respondent at 4567 Dixie Road, Mississauga, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff.” (11 employees in unit). (*Having regard to the agreement of the parties*).

0780-84-R: Labourers’ International Union of North America, Local 1059, (Applicant) v. 584134 Ontario Limited, (Respondent).

Unit #1: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

0781-84-R: Labourers' International Union of North America, Local 1059, (Applicant) v. C.W.A. Contracting (London) Limited, (Respondent).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

0789-84-R: The Canadian Guards Association, (Applicant) v. The Westin Hotel, (Respondent).

Unit: "all security guards employed by the respondent in the City of Ottawa, save and except supervisors, and persons above the rank of supervisor." (8 employees in unit). (*Having regard to the agreement of the parties*).

0791-84-R: International Union of Operating Engineers, Local 793, (Applicant) v. Geodex Foundation Inc., (Respondent).

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all employees of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

0792-84-R: Ironworkers District Council of Ontario, (Applicant) v. Jet Erectors, (Respondent).

Unit #1: "all ironworkers and ironworkers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all ironworkers and ironworkers' apprentices in the employ of the respondent in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering) the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

0794-84-R: Ontario Nurses' Association, (Applicant) v. Fairview Manor Home For Senior Citizens, (Respondent).

Unit #1: "all registered and graduate nurses employed in a nursing capacity by the respondent at Almonte, Ontario, save and except Director of nursing, persons above the rank of Director of nursing and persons regularly employed for not more than 24 hours per week." (2 employees in unit).

Unit #2: "all registered and graduate nurses employed in a nursing capacity by the respondent at Almonte, Ontario who are regularly employed for not more than 24 hours per week, save and except Director of nursing and persons above the rank of Director of nursing." (5 employees in unit). (*Having regard to the agreement of the parties*).

0795-84-R: Ontario Nurses' Association, (Applicant) v. Mountain Nursing Home Ltd., (Respondent).

Unit #1: "all registered and graduate nurses employed in a nursing capacity by the respondent in Hamilton, Ontario, save and except the Director of Nursing, persons above the rank of Director of Nursing, registered and graduate nurses regularly employed for not more than twenty-four (24) hours per week and persons covered by a subsisting collective agreement." (4 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all registered and graduate nurses employed in a nursing capacity who are regularly employed for not more than twenty-four (24) hours per week by the respondent in Hamilton, Ontario, save and except the Director of Nursing, persons above the rank of Director of Nursing and persons covered by a subsisting collective agreement." (3 employees in unit). (*Having regard to the agreement of the parties*).

0796-84-R: United Food and Commercial Workers International Union, Local 1105P, (Applicant) v. Beatrice Foods (Ontario) Limited, Good Humor Division, (Respondent).

Unit: "all employees of the respondent at its Good Humor Plant at Simcoe, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period save and except watchmen, office and sales staff, drafting and engineering departments' staff, foreman and persons above the rank of foreman." (47 employees in unit). (*Having regard to the agreement of the parties*).

0797-84-R: United Food and Commercial Workers International Union, Local 1000A, (Applicant) v. G. Brandt Meat Packers Ltd., (Respondent).

Unit: "all employees of the respondent in the City of Mississauga save and except foremen, persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (49 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

0802-84-R: Graphic Communications International Union, Local 542, (Applicant) v. Davis & Henderson Limited, (Respondent).

Unit: "all lithographic production employees of the respondent at Waterloo, Ontario, save and except production manager, persons above the rank of production manager and persons covered by subsisting collective agreements." (20 employees in unit). (*Having regard to the agreement of the parties*).

0819-84-R: United Brotherhood of Carpenters and Joiners of America, Local Union 2737, (Applicant) v. Commercial Marine Limited, (Respondent).

Unit: "all employees of the respondent at Niagara Falls, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff." (11 employees in unit). (*Having regard to the agreement of the parties*).

0832-84-R: London and District Service Workers' Union, Local 220 SEIU, AFL, CIO, CLC, (Applicant) v. Extendicare, A Division of Crown Inc., (Respondent).

Unit: "all registered nurses employed in a nursing capacity by the respondent at Port Stanley, Ontario, save and except head nurse, persons above the rank of head nurse, office staff and registered nurses regularly employed for not more than 24 hours per week." (11 employees in unit). (*Clarity Note*).

0840-84-R: Association of Employees of Footwear Fashions Limited, (Applicant) v. Footwear Fashions Limited, (Respondent).

Unit: "all employees of the respondent at London, Ontario, save and except foremen and supervisors, and persons above the rank of foreman and supervisor, office and sales staff." (33 employees in unit).

0843-84-R: Labourers' International Union of North America, Local 183, (Applicant) v. Goldmar Construction Ltd., (Respondent).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

0844-84-R: The Canadian Union of Public Employees, (Applicant) v. Essex County Roman Catholic Separate School Board, (Respondent).

Unit: "all employees of the respondent in Essex County, save and except supervisors, persons above the rank of supervisor, confidential secretaries to the Director of Education and Superintendents of Education and Business Administration, private secretary translators, persons employed as teachers, persons employed on a government sponsored program, and persons covered by subsisting collective agreements." (13 employees in unit). (*Having regard to the agreement of the parties*).

0845-84-R: St. Catharines Typographical Union (416), (Applicant) v. High Times Publications Ltd., (Respondent).

Unit: "all employees of the respondent at St. Catharines, save and except managing editor, manager, bookkeeper, persons above the rank of manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (16 employees in unit). (*Having regard to the agreement of the parties*).

0856-84-R: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Armco Foods Limited, (Respondent).

Unit: "all employees of the respondent in Midland, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (10 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

0873-84-R: Hotel Employees and Restaurant Employees Union, Local 75, (Applicant) v. Northmount Industrial Catering Limited, (Respondent).

Unit: "all employees of the respondent at Teck Corporation Camp in the Township of Marathon, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff." (6 employees in unit). (*Having regard to the agreement of the parties*).

0881-84-R: Teamsters Local Union No. 141, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Earl Skcheib International, (Respondent).

Unit: "all employees of the respondent in London, Ontario, save and except foremen, persons above the rank of foreman, office, clerical and sales staff." (8 employees in unit). (*Having regard to the agreement of the parties*).

0882-84-R: Labourers' International Union of North America, Local 607, (Applicant) v. Rugged Air Systems Limited, (Respondent).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and

institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

Unit #2: “all construction labourers in the employ of the respondent in the District of Kenora including the Patricia portion, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

0909-84-R: International Beverage Dispensers and Bartenders Union Local 280 of the Hotel & Restaurant Employees & Bartenders International Union, (Applicant) v. 484307 Ontario Inc., c.o.b. as Carousel Inn, (Respondent).

Unit: “all full-time and part-time tapmen, bartenders, beverage waiters and waitresses, barboys, floor-men and improvers of the respondent in the City of Oshawa.” (24 employees in unit). (*Having regard to the agreement of the parties*).

0911-84-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, (Applicant) v. 273-534 Ontario Ltd., D.B.A. Bradgate Arms, (Respondent).

Unit: “all employees of the respondent in the Municipality of Metropolitan Toronto, save and except Supervisors, persons above the rank of Supervisor, Office, Sales and Accounting Staff, and students employed during the school vacation period.” (25 employees in unit). (*Having regard to the agreement of the parties*).

0935-84-R: International Brotherhood of Painters and Allied Trades — Local Union 1891, (Applicant) v. Sherway Painting, (Respondent).

Unit: “all painters and painters’ apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

0937-84-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. C & S Auto Parts Ltd., (Respondent).

Unit: “all employees of the respondent in its Collins Machine Shop Division, in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (9 employees in unit). (*Having regard to the agreement of the parties*).

0946-84-R: United Steelworkers of America, (Applicant) v. Algoma Community Legal Clinic, (Respondent).

Unit: “all employees of the respondent at Sault Ste. Marie, Ontario, save and except executive director and persons above the rank of executive director.” (3 employees in unit). (*Having regard to the agreement of the parties*).

0948-84-R: Labourers’ International Union of North America, Local 1059, (Applicant) v. Refflinghaus Construction Company Limited, (Respondent).

Unit #1: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

Unit #2: “all construction labourers in the employ of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce, and Elgin, excluding the industrial, commercial and institutional sector, save

and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

0968-84-R: United Brotherhood of Carpenters and Joiners of America, Local Union 2222, (Applicant) v. Refflinghaus Construction Company Limited, (Respondent).

Unit #1: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in unit).

Unit #2: “all carpenters and carpenters’ apprentices in the employ of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce, and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in unit).

0970-84-R: Labourers’ International Union of North America Local 527, (Applicant) v. Cornwall Gravel Company Limited, (Respondent).

Unit #1: all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in unit).

Unit #2: “all construction labourers in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in unit).

1011-84-R: International Union of Operating Engineers, Local 793, (Applicant) v. Fapp Co. Contractors Ltd., (Respondent) v. Teamsters Local Union No. 230, Ready Mix, Building Supply, Hydro and Construction Drivers, Warehousemen and Helpers of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Intervener).

Unit #1: “all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in unit).

Unit #2: “all employees of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in unit).

BARGAINING AGENTS CERTIFIED SUBSEQUENT TO A PRE-HEARING VOTE

0536-84-R: International Ladies’ Garment Workers’ Union, (Applicant) v. S. D. R. Apparel Inc., (Respondent).

Unit: “all employees of the respondent in the Municipality of Metropolitan Toronto save and except supervisors, persons above the rank of supervisor, office, sales and design staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.” (79 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters’ list
Number of persons who cast ballots

78

71

Number of ballots marked in favour of applicant	44
Number of ballots marked against applicant	27

0651-84-R: Canadian Union of Public Employees, (Applicant) v. Scarborough General Hospital, (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except professional medical staff, registered and graduate nurses, pharmacists and undergraduate pharmacists, graduate and student dietitians, paramedical employees, office and clerical staff, students employed through co-operative training programs or work experience programs, supervisors and persons above the rank of supervisor and persons covered by subsisting collective agreements." (124 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list	313
Number of persons who cast ballots	158
Number of ballots marked in favour of applicant	127
Number of ballots marked against applicant	28
Ballots segregated and not counted	3

0674-84-R: The Canadian Union of Public Employees, (Applicant) v. Toronto Western Hospital, (Respondent).

Unit: "all office and clerical employees of the respondent in Toronto, save and except supervisors, persons above the rank of supervisor, personnel assistants, employment officers, secretaries to the Executive Director, Associate Executive Director, Assistant Executive Directors, Medical Director, Director of Finance, Director of Nursing and Director of Personnel, persons regularly employed for not more than 24 hours per week, students employed during the school vacation periods and persons covered by subsisting collective agreements." (332 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Number of names of persons on revised voters' list	294
Number of persons who cast ballots	257
Number of ballots excluding segregated ballots cast by persons whose name appear on voters' list	254
Number of spoiled ballots	1
Number of ballots marked in favour of applicant;	143
Number of ballots marked against applicant	110
Ballots segregated and not counted	3

BARGAINING AGENTS CERTIFIED SUBSEQUENT TO A POST-HEARING VOTE

2476-83-R: United Food and Commercial Workers International Union, Local 175, (Applicant) v. 561270 Ontario Inc., c.o.b. as St. Laurent I.G.A., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at its stores in Ottawa, save and except full-time meat department employees, department managers, head cashier, office and clerical staff, store manager and persons above the rank of store manager." (85 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list	89
Number of persons who cast ballots	76
Number of ballots marked in favour of applicant	40
Number of ballots marked against applicant	36

0266-84-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers

of America, U.A.W., (Applicant) v. Chrome-Tek Plastics (1982) Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Chatham, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the summer vacation period." (48 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		45
Number of persons who cast ballots	43	
Number of ballots marked in favour of applicant		23
Number of ballots marked against applicant		20

0349-84-R: International Association of Machinists and Aerospace Workers, (Applicant) v. Cornelius Pools Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent employed in the City of St. Catharines, Ontario, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff." (57 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		55
Number of persons who cast ballots		56
Number of ballots excluding segregated ballots cast by persons whose name appear on voters' list		54
Number of ballots marked in favour of applicant		32
Number of ballots marked against applicant		22
Ballots segregated and not counted		2

0460-84-R: Alliance Employees Union, (Applicant) v. Public Service Alliance of Canada, (Respondents) v. The Ottawa Typographical Union, Local 102, (Intervener).

Unit: "all employees of the respondent in the City of Ottawa employed in the mail distribution centre, print shop, and purchasing and stores section save and except executive secretary and persons above the rank of executive secretary." (23 employees in unit). (*Having regard to the agreement of the parties*).

Number of persons on list as originally prepared by employer		19
Number of persons who cast ballots	15	
Number of ballots marked in favour of applicant		14
Number of ballots marked in favour of intervener		1

0587-84-R: Service Employees Union, Local 204, affiliated with S.E.I.U., A.F. of L., C.I.O., C.L.C., (Applicant) v. Spencer House, (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto regularly employed for not more than twenty-four hours per week and students employed for not more than twenty-four hours per week and students employed during the school vacation period save and except professional medical staff, graduate nurses, under-graduate nurses, physiotherapists, occupational therapists, director of activities, supervisors, persons above the rank of supervisor and office staff." (22 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		21
Number of persons who cast ballots	16	
Number of ballots excluding segregated ballots cast by persons whose name appear on voters' list		15
Number of ballots marked in favour of applicant		15
Number of ballots marked against applicant	0	
Ballots segregated and not counted		1

0654-84-R: Ontario Public Service Employees Union, (Applicant) v. Oaklands Regional Centre, (Respondent).

Unit: "all employees of the respondent at Oakville, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, secretary to the Executive Administrator, secretaries to the Personnel Supervisor, and persons covered by subsisting collective agreements." (68 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Number of names of persons on revised voters' list		61
Number of persons who cast ballots	41	
Number of ballots marked in favour of applicant		28
Number of ballots marked against applicant		13

APPLICATIONS FOR CERTIFICATION DISMISSED – NO VOTE CONDUCTED

2542-83-R: The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 508, (Applicant) v. National Caterer Ltd., (Respondent). (2 employees in unit).

0475-84-R: The United Brotherhood of Carpenters and Joiners of America, Local 1030, (Applicant) v. Insul-Glass Limited, (Respondent) v. Group of Employees, (Objectors). (6 employees in unit).

0603-84-R: International Union of Operating Engineers, Local 793, (Applicant) v. Lemay Vican Inc., (Respondent). (33 employees in unit).

0746-84-R: International Molders & Allied Workers Union, (Applicant) v. Quadrant Industries Limited, (Respondent) v. Group of Employees, (Objectors). (38 employees in unit).

0770-84-R: Hotel Employees and Restaurant Employees Union, Local 75, (Applicant) v. Societa Italiana Di Benevolenza "Principe Di Piemonte" DaVinci Centre, (Respondent). (52 employees in unit).

0855-84-R: Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Central Information Services, (Respondent). (65 employees in unit).

0871-84-R: United Food & Commercial Workers, Local 409, (Applicant) v. S. S. Kresge Company (a Division of K mart Canada Limited), (Respondent). (21 employees in unit).

0923-84-R: Hotel Employees Restaurant Employees Union, Local 75, (Applicant) v. Cara Operations Limited, (Respondent). (23 employees in unit).

APPLICATIONS FOR CERTIFICATION DISMISSED SUBSEQUENT TO A PRE-HEARING VOTE

0220-84-R: Labourers' International Union of North America, Local 506, (Applicant) v. Metro Concrete Floors Inc., (Respondent) v. Operative Plasterers' and Cement Masons' Local 598, (Intervener).

Unit: "all cement masons and cement masons' apprentices in the employ of the respondent engaged in cement finishing work in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all cement masons and cement masons' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities

of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in unit). (*Clarity Note*).

Number of persons on revised voters' list		10
Number of persons who cast ballots	10	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		3
Number of ballots marked in favour of intervener		6

0715-84-R: International Woodworkers of America, (Applicant) v. Townscape Products (Canada) Limited, (Respondent).

Unit: "all employees of the respondent in Simcoe, Ontario, save and except foremen, persons above the rank of foremen, forelady, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (7 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		4
Number of persons who cast ballots	4	
Number of ballots marked in favour of applicant		0
Number of ballots marked against applicant		4

APPLICATIONS FOR CERTIFICATION DISMISSED SUBSEQUENT TO A POST-HEARING VOTE

0487-84-R: The Canadian Union of Public Employees, (Applicant) v. Peterborough Young Women's Christian Association, (Respondent) v. Group of Employees, (Objectors).

Unit#1: "all employees of the respondent in Peterborough, Ontario, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (14 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent in Peterborough, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors and persons above the rank of supervisor." (12 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Number of persons on list as originally prepared by employer		20
Number of persons who cast ballots	12	
Number of ballots marked in favour of applicant		4
Number of ballots marked against applicant		8

0530-84-R: Service Employees Union, Local 204, Affiliated with S.E.I.U., A.F. of L., C.I.O., C.L.C., (Applicant) v. Monarch Investments Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Eglinton Square Shopping Centre in Metropolitan Toronto save and except supervisors, persons above the rank of supervisor, office staff and persons regularly employed for not more than twenty-four hours per week." (8 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		7
Number of persons who cast ballots	7	

Number of ballots marked in favour of applicant	1
Number of ballots marked against applicant	6

APPLICATIONS FOR CERTIFICATION WITHDRAWN

2190-83-R: Canadian Union of Public Employees, (Applicant) v. The Essex County Roman Catholic Separate School Board, (Respondent).

2233-83-R: Canadian Union of Public Employees, (Applicant) v. Town of Capreol – Community Centre, (Respondent).

0295-84-R: International Union of Bricklayers and Allied Craftsmen, Local 2, (Applicant) v. Clifford Masonry Limited (Restoration Division), (Respondent) v. Operative Plasterers & Cement Masons Int. Assoc. of the United States and Canada, Local 172, (Intervener).

0608-84-R: Motion Picture Projectionists' Union, Local 345 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, (Applicant) v. Tempo Films Limited, a Canadian Company, owned whole or in part by Mr. T. Alex Metcalfe and all other persons or Companies having a share in Tempo Films Ltd., (Respondent).

0660-84-R: Ironworkers District Council of Ontario, (Applicant) v. Ball Brothers Ltd., (Respondent).

0709-84-R: United Brotherhood of Carpenters and Joiners of America, Local Union 1669, (Applicant) v. C & R Enterprises, (Respondent).

0716-84-R: Retail, Wholesale & Department Store Union, AFL-CIO-CLC, (Applicant) v. Hudson Bay Limited, (Respondent) v. Group of Employees, (Objectors).

0761-84-R: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Steeles Bakery Ltd. (C.O.B.) Mr. Bagel Ltd., (Respondent).

0803-84-R: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. Collins Machine Shop Division of C & S Auto Parts Ltd., (Respondent).

0866-84-R: Association of Professional Student Services Personnel, (Applicant) v. Halton Roman Catholic Separate School Board, (Respondent).

0872-84-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. The Stronco Group Incorporated, (Respondent).

0874-84-R: Canadian Union of Public Employees, (Applicant) v. Victoria County Board of Education, (Respondent).

0879-84-R: Canadian Union of Restaurant and Related Employees, Hotel Employees, Restaurant Employees Union, Local 88 AFL-CIO-CLC, (Applicant) v. York County Quality Foods Ltd., (Respondent) v. United Food and Commercial Workers Union Local 1000A, (Intervener).

0892-84-R: Service Employees Union, Local 210, Affiliated with Service Employees International Union, AFL-CIO-CLC, (Applicant) v. Essex County Automobile Club Affiliated with the C.A.A. and O.M.L., (Respondent).

0893-84-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC, (Applicant) v. Purolator Courier Ltd., (Respondent).

0894-84-R: Labourers' International Union of North America, Local 1059, (Applicant) v. L'82 Construction (509817 Ontario Limited), (Respondent).

0910-84-R: Laundry and Linen Drivers and Industrial Workers Union Local 847, Teamsters, (Applicant) v. Direct Home Upholstery Ltd., (Respondent).

0969-84-R: Canadian Union of Public Employees, (Applicant) v. Windsor Occupational Health Information Service, (Respondent).

0980-84-R: Labourers' International Union of North America, Local 1059, (Applicant) v. Refflinghaus Construction Company Limited, (Respondent).

1001-84-R: Labourers' International Union of North America, Local 506, (Applicant) v. Tricon Construction Corporation, (Respondent).

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

1517-83-R: Service Employees Union, Local 183, A.F.L., C.I.O., C.L.C., (Applicant) v. Centre Hastings Nursing Home Limited, and Miklos and Mary Horvath carrying on business as Fabeth Nursing Home and Horvaths Retirement Home, (Respondents). (*Dismissed*).

1853-83-R: Teamsters Local Union, 419, (Applicant) v. Metro Toronto News Company Limited and Magcan Traffic Services Limited, (Respondent). (*Withdrawn*).

2942-83-R: Amalgamated Clothing & Textile Workers Union, (Applicant) v. Antonacci Clothes Inc. and British Brand Clothes Limited, (Respondent). (*Withdrawn*).

3067-83-R: International Brotherhood of Electrical Workers, Local 353, (Applicant) v. Trident Holdings Limited c.o.b. as Trident Electric and Gambin Electric Co. Ltd., (Respondent). (*Dismissed*).

0187-84-R: Local 1316, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Huron Drywall Limited and Melrose Steel & Acoustics Ltd., (Respondent) v. Group of Employees, (Objectors). (*Granted*).

0270-84-R: United Brotherhood of Carpenters and Joiners of America, Local 2486, (Applicant) v. Northway Industries Ltd. and Kahkonen Construction (1979) Ltd., (Respondent). (*Withdrawn*).

0296-84-R: United Brotherhood of Carpenters and Joiners of America, Local 1316, (Applicant) v. Huron Drywall Limited and Melrose Steel & Acoustics Ltd., (Respondents). (*Granted*).

0321-84-R: International Ladies Garment Workers Union, (Applicant) v. Trojan Sportswear Limited and Pacific Odyssey Limited, (Respondents). (*Withdrawn*).

0395-84-R; 0396-84-R: International Union of Bricklayers and Allied Craftsmen, Ontario Provincial Conference and The International Union of Bricklayers and Allied Craftsmen, Local 12, (Applicants) v. Able Masonry (Eastern) Limited Pro Construction (Kitchener-Waterloo) Limited, (Respondents). (*Withdrawn*).

0452-84-R: Amalgamated Clothing and Textile Workers Union — Toronto Joint Board, (Applicant) v. Marvelle '84 Pant Company and Marvel Pant Co. Limited, (Respondents). (*Withdrawn*).

0454-84-R: United Brotherhood of Carpenters and Joiners of America, Local 1669, (Applicant) v. Pasquali D'Angelo, D'Angelo Bro's Limited General Contractors, D'Angelo Construction Befaro Apartments Limited, Befaro Construction, Befaro Home Improvements and Building Supplies, (Respondents). (*Withdrawn*).

0456-84-R; 0457-84-R: Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 1081, (Applicants) v. Stradiotto Brothers Construction Limited, Stradiotto Inc., Stoneview Masonry Limited, (Respondents). (*Withdrawn*).

0489-84-R: Labourers' International Union of North America, Ontario Provincial District Council, (Applicants) v. Cam-Teves Contractors Ltd. and Wil-Mat Holdings Ltd., (Respondents). (*Withdrawn*).

SALE OF A BUSINESS

1910-83-R: Service Employees International Union, Local 204, A.F.L.-C.I.O.-C.L.C., (Applicant) v. Kennedy Lodge Inc. and Medox Health Care Services, a division of Drake International Inc., (Respondent). (*Granted*).

2943-83-R: Amalgamated Clothing & Textile Workers Union, (Applicant) v. Antonacci Clothes Inc. and British Brand Clothes Limited, (Respondent). (*Granted*).

0254-84-U: Canadian Textile Workers' Union, Local 171 National Council of Canadian Labour, (Complainant) v. J. G. Field & Co. Ltd., (Respondent).

Unit: "all employees of the respondent at Stratford, Ontario save and except foremen, persons above the rank of foreman, fixers, sales and office staff, maintenance department employees, dyers, home workers, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (*Having regard to the agreement of the parties*). (*Dismissed*).

Number of names of persons on revised voters' list		87
Number of persons who cast ballots	80	
Number of ballots excluding segregated ballots cast by persons whose name appear on voters' list		78
Number of ballots marked in favour of applicant		12
Number of ballots marked against applicant		67
Ballots segregated and not counted		1

[This file was processed as a s.63 application by agreement. The vote was directed under s.63(8) due to intermingling of employees]

0451-84-R: Amalgamated Clothing and Textile Workers Union — Toronto Joint Board, (Applicant) v. Marvelle '84 Pant Company, (Respondent). (*Withdrawn*).

0457-84-R: International Union of Bricklayers and Allied Craftsmen, Ontario Provincial Conference, (Applicants) v. Stradiotto Brothers Construction Limited, Stradiotto Inc., Stoneview Masonry Limited, (Respondents). (*Withdrawn*).

0519-84-R: International Beverage Dispensers' and Bartenders' Union, Local 280, (Applicant) v. 575699 Ontario Ltd., (Respondent). (*Granted*).

APPLICATIONS FOR DECLARATION OF TERMINATING BARGAINING RIGHTS

1321-83-R: Claude Mongeon, (Applicant) v. The Canadian Union of Public Employees, (Respondent) v. Cochrane-Iroquois Falls District Roman Catholic Separate School Board, (Intervener).

Unit: "all office, clerical and technical employees of the Cochrane-Iroquois Falls District Roman Catholic Separate School Board, save and except the Superintendent of Business, persons above the rank of Superintendent of Business, Accountant, Administrative Assistant to the Director of Education, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and persons covered by existing collective agreements with the Cochrane-Iroquois Falls District Roman Catholic Separate School Board." (16 employees in unit). (*Dismissed*).

Number of names of persons on list as originally prepared by employer		15
Number of persons who cast ballots	15	
Number of ballots marked in favour of respondent		7
Number of ballots marked against respondent		6
Ballots segregated and not counted		2

1626-83-R: Stephen Rath, (Applicant) v. Teamsters Union Local 141, (Respondent) v. Inter City Papers Limited, (Intervener).

Unit: "all employees of Inter City Papers Limited at 1595 Sise Rd. in the City of London and at any other address within the City of London to which this operation may be moved, save and except foreman, persons above the rank of foreman, office and sales staff and students employed during the school vacation period." (14 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared by employer		16
Number of persons who cast ballots	13	
Number of ballots excluding segregated ballots cast by persons whose name appear on voters' list		12
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		1
Number of ballots marked against respondent		10
Ballots segregated and not counted		1

3058-83-R: Ivan R. McNabb, (Applicant) v. the Ontario Provincial Council, United Brotherhood of Carpenters and Joiners of America, (O.P.C.), (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of Thom Construction Ltd. in the industrial, commercial and industry in the Province of Ontario, and all other sectors in the County of Grey, save and except non-working foremen and persons above the rank of non-working foreman." (1 employees in unit). (*Granted*).

Number of names of persons on revised voters' list		1
Number of persons who cast ballots	1	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		1

3126-83-R: N. Gollo, Scot Suchocky, Nguyet Thi Huynh, Oi-Ping Chan, Corinne Whiting, Arello Emilio, Marian Fraser, Eva Love, Robert Deramancauk, Marie Skorine, Imelda Eugenio, Edith Wozniah, Ronald Leppamaki, Robert C. Johansson, (Applicant) v. Amalgamated Clothing and Textile Workers Union, Local 998, (Respondent). (15 employees). (*Dismissed*).

3130-83-R: Raymond Tetroe, (Applicant) v. International Union of Operating Engineers, Local 793, (Respondent) v. Shaw Pipe Protection Limited, (Intervener) v. Group of Employees, (Objectors).

Unit: "all employees of Shaw Pipe Protection Limited in Welland, save and except foremen, persons above the rank of foreman, sales, office and clerical staff." (108 employees in unit). (Having regard to the agreement of the parties). (*Granted*).

Number of names of persons on revised voters' list		66
Number of persons who cast ballots	63	
Number of ballots marked in favour of respondent		26
Number of ballots marked against respondent		37

3131-83-R: Nancy Majander Sloan and Jerry A. Kosmerly, (Applicants) v. The Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada — Local 800, (Respondent).

Unit: "all plumbers, steamfitters, pipefitters, welders and apprentices thereof and job foremen employed by Morrison Plumbing & Heating (Sudbury) Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all plumbers, steamfitters, pipefitters, welders and apprentices thereof and job foreman employed by Morrison Plumbing & Heating (Sudbury) Ltd. in all other sectors within a radius of 57 kilometers (approximately 35 miles) of the City of Sudbury Federal Building, excluding non-working foremen and persons above the rank of non-working foreman." (2 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared by employer		3
Number of persons who cast ballots	2	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		2

3133-83-R: Henry Snow, (Applicant) v. Sheet Metal Workers International Association Local No. 285 Union, (Respondent) v. Rennie Sheet Metal Limited, (Intervener).

Unit: "all journeymen sheet metal workers and registered sheet metal apprentices employed in the residential sector of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, the Towns of Ajax and Pickering in the Regional Municipality of Durham." (1 employee in unit). (*Dismissed*).

0416-84-R: Ian Barnes, (Applicant) v. The Canadian Union of Public Employees and its Local 2453, (Respondent).

Unit: "all employees of Chateau Gardens (Lancaster) Inc. at its nursing home at Lancaster, Ontario, save and except office, professional and medical staff, registered, graduate and undergraduate nurses, department heads, and persons above the rank of department head." (29 employees in unit). (*Dismissed*).

0508-84-R: William Baziuk & Doris Baziuk, (Applicant) v. United Steelworkers of America, (Respondent). (2 employees in unit). (*Dismissed*).

0580-84-R: Daniel Richer, (Applicant) v. Local Union 71 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, (Respondent) v. Volcano Inc., (Intervener). (5 employees in unit). (*Dismissed*).

0591-84-R: Lil Rule as Representative of Certain Employees of D.H. Foods (Marathon) Ltd. also known as Tomboy Grocers, (Applicant) v. Retail Clerks Union, Local 409, chartered by United Food and Commercial Workers International Union and affiliated with the CLC-AFL-CIO, (Respondent) v. D.H. Foods (Marathon) Ltd. also known as Tomboy Grocers, (Intervener). (15 employees in unit) (*Withdrawn*).

0617-84-R: G. M. of Canada Nurses, St. Catharines Plants Ethel Cressman, Connie Filko, Peter Kennedy, Jacqueline McMartin, Neville Robson, (Applicants) v. O. N. A., (Respondent). (11 employees in unit). (*Withdrawn*).

REFERRAL AS TO APPOINTMENT OF CONCILIATION OFFICER

0018-84-M: The Kitchener-Waterloo Catholic High School Board of Governors, (Employer) v. London & District Service Workers Union, Local 220, (Trade Union). (*Granted*).

COMPLAINTS OF UNFAIR LABOUR PRACTICE

1909-83-U: Service Employees International Union, Local 204 (A.F.L., C.I.O., C.L.C.), (Complainant) v. Kennedy Lodge Inc., Kennedy Lodge Limited Partnership, Earl Daynes, Daynes Health Care Limited, Medox Health Care Services, a division of Drake International Inc., and Drake International Inc., (Respondents). (*Granted*).

2552-83-U: John Maslo, (Complainant) v. Len Froggatt, Directing Business Representative Lodge #78, International Association of Machinists and Aerospace Workers, (Respondents). (*Dismissed*).

2580-83-U: Harsh Mehta, (Complainant) v. Retail, Wholesale Bakery and Confectionery Workers' Union, AFL:CIO:CLC:, Local 461, (Respondent) v. Humpty Dumpty Foods Ltd., (Intervener). (*Dismissed*).

2592-83-U: Ontario Public Service Employees Union, (Complainant) v. Mary Barnes, Shari Cunningham and St. Clair College of Applied Arts and Technology, (Respondents). (*Dismissed*).

2668-83-U: Felix Charles, (Complainant) v. Canadian Union of United Brewery, Flour, Cereal, Soft Drink & Distillery Workers, Local 304 (Respondent). (*Granted*).

2715-83-U: George MacLean, (Complainant) v. International Brotherhood of Electrical Workers Local Union 402, (Respondent) v. D. R. McCormick Electric Ltd., (Intervener). (*Withdrawn*).

2784-83-U: Canadian Union of Public Employees, Local 1, (Complainant) v. the Toronto Electric Commissioners, (Respondent). (*Withdrawn*).

3045-83-U: Johnson Stewart, (Complainant) v. Lumber and Sawmill Workers' Union, Local 2995 of the United Brotherhood of Carpenters and Joiners of America, (Respondent). (*Withdrawn*).

0096-84-U: Labourers' International Union of North America, Local 1089, (Complainant) v. Oak Valley Contractors Inc., (Respondent). (*Withdrawn*).

0120-84-U: Canadian Paperworkers Union, Local 84, (Complainant) v. Ontario Paper Company, (Thorold, Ontario), (Respondent). (*Withdrawn*).

0254-84-U: Canadian Textile Workers' Union, Local 171, National Council of Canadian Labour, (Applicant) v. J. G. Field & Co. Ltd., (Respondent). (*Withdrawn*).

0282-84-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC, (Complainant) v. Hudson Bay Company, (Respondent). (*Withdrawn*).

0344-84-U: Hyacinth Davidson, (Complainant) v. F. W. Woolworth Co. Limited, and Retail, Wholesale and Department Store Union, Local 414, (Respondents). (*Dismissed*).

0372-84-U: United Food and Commercial Workers International Union, AFL-CIO-CLC, (Complainant) v. Pacific Labour Services Ltd., (Respondent). (*Withdrawn*).

0401-84-U: United Food and Commercial Workers International Union, (Complainant) v. Flavour Land Beef Limited, (Respondent). (*Withdrawn*).

0425-84-U: The Canadian Guards Association, Local 114, (Complainant) v. Pinkerton's of Canada Limited, (Respondent). (*Withdrawn*).

0439-84-U: Robert Tessier, (Complainant) v. Local 13911 United Steel Workers of America, (Respondent). (*Withdrawn*).

0450-84-U: Amalgamated Clothing and Textile Workers Union — Toronto Joint Board, (Complainant) v. Marvelle '84 Pant Company and Marvel Pant Co. Limited, (Respondents). (*Withdrawn*).

0467-84-U: Scott Frederick Andrews, (Complainant) v. L. U. 353, I.B.E.W., (Respondent). (*Withdrawn*).

0468-84-U: Scott Andrews, (Complainant) v. A. K. Electric, (Respondent). (*Withdrawn*).

0520-84-U: International Beverage Dispensers' And Bartenders' Union, Local 280, (Complainant) v. Simcoe Public House Limited, and 575699 Ontario Ltd., (Respondent). (*Withdrawn*).

0521-84-U: Teamsters Union Local 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Clarke Transport Canada Inc., (Respondent). (*Withdrawn*).

0527-84-U: Lumber and Sawmill Workers' Union, Local 2995 of the United Brotherhood of Carpenters and Joiners of America, (Complainant) v. Rexwood Products Limited, (Respondent). (*Withdrawn*).

0551-84-U: Ghiansaroop Persuad, (Complainant) v. Teamsters Union, Local 419, (Respondent) v. Consumers Distributing Company Limited, (Employer). (*Dismissed*).

0557-84-U: Joe Portiss, (Complainant) v. Labourers' International Union of North America, Local 1089, and Rocco D'Andrea, Dan D'Andrea, Gena D'Andrea Persichetti, Orfield Iacobelli, Anna Iacobelli, Anthony Sproviero, Amando Ferrera, Lorne Coleman, (Respondents). (*Withdrawn*).

0559-84-U: Edward William Poole, (Complainant) v. Walker's Warehousing Limited, (Respondent). (*Withdrawn*).

0565-84-U: Edward William Poole, (Complainant) v. Teamsters Union, Local 938, (Respondent) v. Walker's Warehousing Limited, (Intervener). (*Withdrawn*).

0589-84-U: Energy and Chemical Workers Union, (Complainant) v. C. E. Jamieson and Company (Dominion) Limited, (Respondent). (*Withdrawn*).

0592-84-U: Noor E. Esmail, (Complainant) v. Canadian Red Cross Blood Transfusion Service Employees Association, (Respondent). (*Dismissed*).

0593-84-U: Frankie Shum, (Complainant) v. Union Local 75, (Respondent). (*Withdrawn*).

0596-84-U: Therese Bourgeois, (Complainant) v. Sensenbrenner Hospital, (Respondent). (*Withdrawn*).

0601-84-U: United Brotherhood of Carpenters and Joiners of America, Local 1304, (Complainant) v. Carpenters District Council of Toronto and Vicinity and United Brotherhood of Carpenters and Joiners of America, Local 27 and Metropoli Construction Ltd., (Respondents). (*Withdrawn*).

0607-84-U: Motion Picture Projectionists' Union, Local 345 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, and hereinafter referred to as the Union, I.A.T.S.E., (Complainant) v. Tempo Films Ltd., a company owned whole or in part by Alex Metcalfe and all other persons or companies having a share in Tempo Films Ltd., (Respondent) v. William McManus, (Intervener). (*Withdrawn*).

0614-84-U: John D. Blake, (Complainant) v. Amalgamated Plant Guards, Local 1962, (Respondent). (*Withdrawn*).

0619-84-U: United Steelworkers of America, (Complainant) v. York Barbell Company Ltd., (Respondent). (*Withdrawn*).

0634-84-U: Health, Office & Professional Employees, a division of United Food & Commercial Workers, Local 206, chartered by the United Food & Commercial Workers International Union, C.L.C., A.F.L.-C.I.O., (Complainant) v. Sara Vista Nursing Home, (Respondent). (*Withdrawn*).

0635-84-U: William J. Sproat, (Complainant) v. USWA, (Local Union 8214), (Respondent). (*Withdrawn*).

0645-84-U: Alvin J. Chard and Larry Scime, (Complainant) v. Local 1979 Union (United Food & Commercial Workers) and Brown Shoe Co., (Respondent). (*Withdrawn*).

0713-84-U: Hotels, Clubs, Restaurants and Taverns Employees' Union, Local 261, (Complainant) v. Sheraton El Mirador and Don Longchamps, Paul Longchamps, Mike Longchamps, (Respondents). (*Withdrawn*).

0720-84-U: Health, Office & Professional Employees, a division of the United Food & Commercial Workers, Local 206, chartered by the United Food & Commercial Workers International Union, C.L.C., A.F.L., C.I.O., (Complainant) v. Hallowell House Ltd., Nursing & Convalescent Home, (Respondent). (*Withdrawn*).

0721-84-U: Retail, Commercial & Industrial Union, Local 206, chartered by the United Food & Commercial Workers International Union, (Complainant) v. College Motor Inn, (Respondent). (*Withdrawn*).

0727-84-U: Food and Service Workers of Canada, (Complainant) v. Federated Building Maintenance Company Limited and Olympia & York Developments Limited, (Respondents). (*Withdrawn*).

0749-84-U: Canadian Union of Public Employees, (Complainant) v. The Halton Roman Catholic Separate School Board, (Respondent). (*Withdrawn*).

0750-84-U: The Canadian Union of Public Employees, (Complainant) v. Toronto Western Hospital, (Respondent). (*Withdrawn*).

0782-84-U: Robert W. Young, (Complainant) v. Harter Furniture Ltd. and U.S.W.A. Union, (Respondent). (*Withdrawn*).

0805-84-U: International Association of Machinists & Aerospace Workers Local Lodge 1740, (Complainant) v. O&K Orenstein & Koppel Canada Limited, (Respondent). (*Withdrawn*).

0806-84-U: Schneiders Office Employees Association, (Complainant) v. J.M. Schneider Inc. and Link Services Inc., (Respondent). (*Withdrawn*).

0809-84-U: Amalgamated Clothing & Textile Workers Union, (Complainant) v. Woodstream Corporation, (Respondent). (*Withdrawn*).

0818-84-U: Theresa Thuillard, (Complainant) v. Sheller Globe UAW Local 1285, (Respondent). (*Withdrawn*).

0820-84-U: Labourers' International Union of North America, Local 183, (Complainant) v. United Brotherhood of Carpenters and Joiners of America, Locals 1190 and 675, Gus Simone, Ken Weiler, Manuel Lego and Tony Iannuzzi; Association of Interior Systems Contractors; Toronto Housing Labour Bureau; Metropolitan Toronto Apartment Builders Association, (Respondents). (*Withdrawn*).

0830-84-U: United Food and Commercial Workers International Union, Local 1000A, (Complainant) v. G. Brandt Meat Packers Ltd., (Respondent). (*Withdrawn*).

0835-84-U: Hotels, Clubs, Restaurants & Tavern Employees Union, Local 261, (Complainant) v. She raton El Mirador and Don Longchamps Jr., (Respondents). (*Withdrawn*).

0839-84-U: Helen Spartalis, (Complainant) v. Union Local No. 75, (Respondent). (*Withdrawn*).

0853-84-U: Antonio Pannunzio, (Complainant) v. U.A.W. and U.A.W. Local 1973, (Respondent). (*Withdrawn*).

0875-84-U: Neville Mortan, (Complainant) v. Distributive Workers of America & Canada District 65, (Respondent). (*Withdrawn*).

0888-84-U: Paul Hatt, (Complainant) v. Southern Ontario Newspaper Guild, (Respondent). (*Withdrawn*).

0890-84-U: United Food and Commercial Workers International Union, Locals 175 & 633, (Complainant) v. 561270 Ontario Inc., c.o.b. as St. Laurent IGA, (Respondent). (*Withdrawn*).

0919-84-U: Linda Coneybeare, (Complainant) v. Wayne McGilvray, Innkeeper & Pinestone Inn, (Respondent). (*Withdrawn*).

0925-84-U: William Hart, (Complainant) v. Teamsters Local 419, (Respondent). (*Withdrawn*).

0983-84-U: Bryan W. Lloyd, (Complainant) v. CUPE Local 43, (Respondent). (*Withdrawn*).

APPLICATIONS FOR CONSENT TO PROSECUTE

1037-84-U: Canadian Union of Public Employees, (Applicant) v. The Corporation of the Township of Plympton, (Respondent). (*Withdrawn*).

APPLICATIONS FOR RELIGIOUS EXEMPTION

0701-84-M: Robert James Chantler, (Applicant) v. United Steelworkers of America, (Respondent Trade Union) v. Camco Inc., (Respondent Employer). (*Dismissed*).

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

0756-84-M: Silcofab Limited, (Employer) v. Amalgamated Clothing & Textile Workers Union, (Trade Union). (*Granted*).

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

0308-84-M: Canadian Union of Public Employees, Local 259, (Applicant) v. The Corporation of the Town of Iroquois Falls, (Respondent). (*Terminated*).

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

2181-83-OH: Robert (Bob) W. Knight, Apt. 11, 5 Main Street East, Kingsville, Ontario, N9A 1A1, (Complainant) V. Stefan Tarnovietchi and Maria Tarnovietchi, also known as Maria Tarnovietchi Lapressa, Box 616 Leamington, Ontario, Bevel Line Road, Mersea Township N8H 3X4 and Bruce Rest Home Limited, carrying on business as Pelee Motor Inn, having its Head Office at 539 Bruce Avenue, Windsor Ontario, N9A 4X1.

0043-84-OH: Donald Henry, Leroy Elaihie, Jerome Pasramen, (Complainant) v. Monik Furniture Parts (Inc.), (Respondent). (*Granted*).

0375-84-OH: John Donaghy, (Complainant) v. Horton C.B.I. Ltd., (Respondent). (*Withdrawn*).

0523-84-OH: Frank Stilson, (Complainant) v. Robert Hunt Corporation, (Respondent). (*Withdrawn*).

0686-84-OH: Barry Hayward, Health and Safety committee member responsible for inspection, (Complainant) v. Dave Curry, Corporation of the City of Ottawa, Pat O'Brien, Corporation of the City of Ottawa, Harry Brinkhof, Corporation of the City of Ottawa, (Respondents). (*Withdrawn*).

CONSTRUCTION INDUSTRY GRIEVANCES

2167-83-M: L.I.U.N.A., Local 506, (Applicant) v. Rock Engineering Limited, (Respondent). (*Withdrawn*).

2176-83-M: The International Brotherhood of Electrical Workers, Local 1788, (Applicant) v. The Electrical Power System Construction Association (EPSCA) and Ontario Hydro, (Respondents). (*Dismissed*).

2768-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Q-Sons Construction Company Limited, (Respondent) v. Carpenters District Council of Toronto and Vicinity, United Brotherhood of Carpenters and Joiners of America on behalf of Local Union 27, (Intervener #1) v. Toronto-Central Ontario Building & Construction Trades Council, (Intervener #2). (*Granted*).

2779-83-M: The Ontario Council of the International Brotherhood of Painters and Allied Trades Local 1494, (Applicant) v. Walter J. Downes Painting Ltd., (Respondent). (*Granted*).

2848-83-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United

Brotherhood of Carpenters and Joiners of America, (Applicant) v. Monaco General Interior Cont. Inc., (Respondent). (*Granted*).

2913-83-M: United Brotherhood of Carpenters and Joiners of America, Local 1304, (Applicant) v. Metropoli Construction Ltd., (Respondent). (*Withdrawn*).

0150-84-M: Labourers' International Union of North America, Local 625, (Applicant) v. R. E. DuMouchelle and Sons Limited, (Respondent). (*Granted*).

0155-84-M: The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 463, (Applicant) v. The Electrical Power Systems Construction Association (EPSCA) and Ontario Hydro, (Respondents). (*Dismissed*).

0354-84-M: United Brotherhood of Carpenters and Joiners of America, Local 1946, (Applicant) v. J. C. Milne Construction Co. (Canada) Inc., (Respondent). (*Withdrawn*).

0621-84-M: United Brotherhood of Carpenters and Joiners of America, Local 2041, (Applicant) v. 114585 Canada Ltee, (Respondent). (*Withdrawn*).

0639-84-M: Labourers' International Union of North America, Local 183, (Applicant) v. G. L. Trenching Ltd., (Respondent). (*Withdrawn*).

0659-84-M: The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 508 -and — The Ontario Pipe Trades Council, (Applicant) v. Mechanical Contractors Association of Ontario and Sheaffer Townsend Ltd., (Respondent). (*Withdrawn*).

0748-84-M: Labourers' International Union of North America, Local 183, (Applicant) v. Etrusca Construction Ltd., (Respondent). (*Withdrawn*).

0775-84-M: Construction Workers Local 6, affiliated with The Christian Labour Association of Canada, (Applicant) v. DeGroot's Plumbing and Heating Ltd., (Respondent). (*Granted*).

0783-84-M: United Brotherhood of Carpenters and Joiners of America, Local 1669, (Applicant) v. Condiversal Limited and Rideau Valley Constructors Limited, (Respondent). (*Withdrawn*).

0812-84-M: Labourers' International Union of North America, local 625, (Applicant) v. R. E. DuMouchelle and Sons Limited, (Respondent). (*Granted*).

0833-84-M: Labourers' International Union of North America, Local 183, (Applicant) v. Joe Zentil Plumbing & Heating Ltd., (Respondent). (*Withdrawn*).

0847-84-M: Labourers' International Union of North America, Local 1059, (Applicant) v. Doug Wright Construction Limited, (Respondent). (*Withdrawn*).

0859-84-M: Labourers International Union of North America, Local 527, (Applicant) v. W. G. McDonald Construction Co. Limited, (Respondent). (*Granted*).

0884-84-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Eagle Store Fixtures Ltd., (Respondent). (*Granted*).

0885-84-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Chairman Mills, (Respondent). (*Withdrawn*).

0886-84-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Antinori Building Contractor Inc. (Respondent). (*Withdrawn*).

0876-84-M: Sheet Metal Workers' International Association, Local Union No. 285, (Applicant v. Weston Sheet Metals Company, A Division of Lung Metals Products Limited, (Respondent). (*Granted*).

0896-874-M: International Union of Operating Engineers, Local 793, (Applicant) v. Bot Construction (Canada) Limited, (Respondent). (*Withdrawn*).

0908-84-M: Sheet Metal Workers' International Association, Local Union 47, (Applicant) v. Servais Sheet Metal Ltd., (Respondent). (*Granted*).

0929-84-M; 0930-84-M: Sheet Metal Workers International Association, Local 235, (Applicant) v. Tradesmen Fabricating Ltd., (Respondent). (*Granted*).

0931-84-M: International Association of Bridge, Structural and Ornamental Ironworkers, Local 700, (Applicant) v. R. J. Cyr Co. Int., (Respondent). (*Granted*).

0941-84-M: Labourers' International Union of North America, local 183, (Applicant v. Sivi Construction Ltd., (Respondent). (*Withdrawn*).

0942-84-M: Labourers' International Union of North America, Local 1059, (Applicant) v. Kent County Contractors (504961), (Respondent). (*Granted*).

0950-84-M: Local Union 562 Sheet Metal Workers' International Association, (Applicant) v. United Sheet Metal (Ontario) Ltd., (Respondent). (*Granted*).

0959-84-M: The Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 527, (Applicant) v. K's Plumbing and Heating Limited, (Respondent). (*Withdrawn*).

0972-84-M: International Union of Operating Engineers, Local 793, (Applicant) v. Serit Construction Ltd., (Respondent). (*Granted*).

0975-84-M: Labourers' International Union of North America, Local 183, (Applicant) v. B. & G. Concrete & Drain Co., (Respondent). (*Withdrawn*).

0992-84-M: The Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 527, (Applicant) v. A. J. Reinhardt Limited, (Respondent). (*Withdrawn*).

1000-84-M: The Ontario Council of the International Brotherhood of Painters and Allied Trades Local 1494, (Respondent) v. Walter J. Downes Painting Ltd., (Respondent). (*Granted*).

1004-84-M: International Union of Operating Engineers, Local 793, (Applicant) v. Williams Contracting Ltd., (Respondent). (*Granted*).

1013-84-M: Labourers' International Union of North America, Local 1059, (Applicant) v. Harbaridge & Cross Limited, (Respondent). (*Withdrawn*).

1022-84-M: United Brotherhood of Carpenters and Joiners of America, Local 1669, (Applicant) v. Bergman Builders Kenora Limited, (Respondent). (*Withdrawn*).

1028-84-M: Labourers' International Union of North America, Local 183, (Applicant) v. Investments Carpentry, (Respondent). (*Withdrawn*).

APPLICATIONS OF RECONSIDERATION OF BOARD'S DECISION

1800-81-U: Mauri Ahokas, Dale Anderson, Gerry Bannon, Hale Beck, Gladys Berringer, John Bodnar, Janice Britton, Bruce Brown, James Buie, Kenneth Cannon, Douglas Carlson, Marcel Chedore, Angela Desserre, Salvatore Federico, William Fikis, Terry Flaherty, Joseph Fron, Robert Goods, Murray Graham, Susan Gross, Robert Heaslip, Edward Heintz, Martin Horvath, William Hughes, Stefan Huzan, Warren Johnson, Brian Johnstone, Eldred Kennedy, Sheila Kehres, Lyn Kislock, David Kozar, John Lebate, Reginald Legace, Harold Lemarguard, Melville Love, Catherine MacKenzie, Dennis Madge, Patricia Martinequ, Brian Matson, Deborah Maunula, Norman Maki, Beverly Milnes, Carol Nesbitt, Glenn Niemi, Judy Opaloch, Frank Pasko, Kenneth Peterson, Kathryn Peterson, John Petrunka, Lawrence Pyorny, John Quinn, Mabel Quinn, Carolyn Ranta, Debra Reith, Clifford Riddell, Peter Robinson, Leonard Roy, Danny Siciliano, Kenneth Sinclair, Ian Smith, Lawrence Spooner, Barbara Stacey, Douglas Strahan, Desmond Stolz, Klaus Taskinen, Thomas Tod, Robert Thompson, Raymond Wataja, Kathryn Welch, Brenda Wisinger, Edward Zapior, Stanley Zapior, Betty Zimmerman, (Complainants) v. The Canadian Union of Public Employees, Local 87, Canadian Union of Public Employees, Grace Hartman, G. LeBel, Eileen Okerlund, William McFarlane, Gloria Welch, Arlene Parker and Eileen Rice, (Respondents). (*Denied*).

0053-83-M: Ontario Allied Construction Trades Council, (Applicant) v. The Electrical Power Systems Construction Association and Ontario Hydro, (Respondents). (*Denied*).

3127-83-R: Employees of Parr's Print & Litho Ltd., (Applicant) v. Graphic Arts International Union, (Respondent) v. Parr's Print & Litho Limited, (Intervener). (*Denied*).

*Ontario Labour Relations Board,
400 University Avenue,
Toronto, Ontario*

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